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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 518

MEYER ACKERMAN, et al., *Petitioners*,

v.

GLOBE-DEMOCRAT PUBLISHING COMPANY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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GLOBE-DEMOCRAT PUBLISHING COMPANY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioners (R. 1-3) pray that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri entered in the above-entitled case on April 8, 1963.

OPINIONS BELOW

The initial opinion of the Missouri Supreme Court, and its subsequent opinion denying rehearing or en banc transfer, are reported at 368 S.W. 2d 469 (*infra*, pp. 2a-23a). Companion opinions in cases presenting cognate questions, initial and on denial of rehearing, are reported as *Allen* v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 460; *Monterosso* v. *St. Louis Globe-Democrat Publishing Co.*, 368 S.W. 2d 48, certiorari

pending, No. 414, October Term 1963; *Irwin* v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 452, certiorari pending, No. 415, October Term 1963. The initial opinion in *Allen* is reprinted *infra*, pp. 24a-36a, and the opinions on rehearing in *Allen*, *Monterosso*, and *Irwin* are reprinted *infra*, pp. 36a-45a.

JURISDICTION

The judgment of the Missouri Supreme Court was entered on April 8, 1963 (R. 671, *infra*, p. 1a). Its order denying rehearing or en banc transfer was entered on June 4, 1963 (R. 741). An order was entered on August 22, 1963, by Mr. Justice Goldberg extending the time for filing a petition for a writ of certiorari to November 2, 1963. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

A collective bargaining agreement in an industry affecting interstate commerce, covering a newspaper publisher's employment of printers in its composing room, provides for severance pay in the event of loss of employment from "merger, consolidation or permanent suspension of publication. . . ." The publisher sells its physical property, including its printing plant, to another publisher, and enters into an agreement for the establishment by that other of a single printing plant to be used to print the newspapers of both. The jury finds that the cessation of printing by one publisher and the undertaking by the other to print both papers is, within the meaning of the agreement, a "merger, consolidation, or permanent suspension of publication", and on that basis returns a verdict for severance pay. The court below reverses, holding that severance pay is due only in the event of corporate

merger or consolidation or going out of the business of publishing a newspaper. Two questions are presented:

1. Whether the principle of the inviolability of a jury verdict supported by evidence with reason applies to an action governed by section 301(a) of the Labor Management Relations Act, 1947, and, if it does, whether in this case the proofs justify with reason the jury's verdict.

2. Whether, independently of the jury verdict, federal substantive law governing the enforcement and interpretation of an LMRA § 301 agreement, correctly formulated and applied, requires the conclusion that severance pay is due.

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act, 1947 (61 Stat. 156, 29 U.S.C. § 185(a)) provides that: "Suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT

Petitioners are 154 printers formerly employed in the composing room of respondent Globe-Democrat Publishing Company which publishes in St. Louis a daily newspaper known as the St. Louis *Globe-Democrat*. (R. 2-4, 19-20, 32-33, 125, 127, 173, 174, 178, 179, 185). Petitioners were represented in collective bar-

gaining by St. Louis Typographical Union No. 8 (R. 34, 19-20). The terms of their employment with the Globe-Democrat were governed by a collective bargaining agreement entered into between the Union and the St. Louis Newspaper Publishers' Association, the latter acting on behalf of the Globe-Democrat and the Pulitzer Publishing Company, publisher of the St. Louis *Post-Dispatch* (R. 4-5, 20, 146-147). The agreement had a duration from January 1, 1958 to December 3, 1959 (R. 4-5, 20). It defined the work committed to the printers as "all composing room work . . ." (R. 40).

The collective bargaining agreement made provision for severance pay in the following terms (R. 6, 20, 34-35):

> 1. Situation holders laid off to reduce the force shall receive severance pay of one week's pay for each year of continuous priority.
>
> 2. *In the event of merger, consolidation or permanent suspension of publication by any newspaper covered by this contract* [emphasis supplied], all employees who lose employment thereby shall receive severance pay as follows:
>
> Employees having six months priority standing, six (6) weeks' pay.
>
> Employees having one year or more priority standing, twelve (12) weeks' pay.
>
> 3. Such severance pay shall be at the employee's regular straight time rate of pay. Priority standing shall be as recorded on the books of chapel officers at the time of such lay off, suspension, merger or consolidation.

The agreement further provided *inter alia* that "All . . . severance pay credits shall be considered as an

earned equity and shall have prior claim in the event of merger, permanent suspension or liquidation. The cost equivalent of any such earned equity shall be paid immediately upon any employee's severance of employment as a result of such merger, permanent suspension or liquidation" (R. 35-36).

On February 21, 1959, at 3:00 a.m., the St. Louis Newspaper Guild, not connected with the St. Louis Typographical Union No. 8 (R. 55), went on strike against the Globe-Democrat and established a picket line (R. 204). Except for two who appeared for work once and were paid, all printers observed the picket line (R. 205). As typically expressed, the printers stated they "chose not to cross the Guild picket line", (R. 279-327), a right available to them under their agreement (Pl. sub. ex. 1, ¶ G, p. 3). On February 21, 1959, the publisher of the Globe-Democrat sent a letter to all Globe-Democrat employees, stating that (R. 116, 119-120):

> I regret very much that the Globe-Democrat will not be able to publish its Sunday edition because of a strike by the St. Louis Newspaper Guild. It does not appear probable that publication will be resumed in the immediate future.

On February 27, 1959, the Globe-Democrat entered into a ten-year agreement with the Pulitzer Publishing Company (R. 122, 145). Pulitzer agreed to print the Globe-Democrat for the latter upon it resumption of publication following settlement of the Guild strike (R. 122). Pulitzer purchased the physical property of the Globe-Democrat, including its printing plant, subject to a temporary lease-back of business and editorial quarters (R. 122-122A, 141-150, pl. exs. 4-7). The agreement provided for the establishment by

Pulitzer of a unified printing plant, using the best of the equipment of both publishers, for the purpose of printing both papers under a single roof (R. 141-142):

> 1. The Pulitzer Publishing Company shall, with all reasonable dispatch, install in the buildings acquired from Globe-Democrat Publishing Company . . . a modern and efficient newspaper printing plant, using the best of its own equipment and the best of the equipment acquired from Globe-Democrat Publishing Company in setting up said plant initially, and shall install in said buildings such additional printing equipment as may be necessary to constitute a modern and efficient newspaper printing plant capable of printing the newspapers published by both parties . . . .
>
> 2. The Pulitzer Publishing Company, in addition to printing its own newspaper in the said plant, shall print the newspaper published by the Globe-Democrat Publishing Company . . . in said plant . . . .

The agreement provided that each publisher would maintain in its own separate quarters it own business, news, advertising, circulation and editorial departments, and independently conduct the business and determine the policies of these departments, to the end that Pulitzer's participation in the operation of the Globe-Democrat would be confined to "the printing of the Globe-Democrat from the point where the news, editorial, advertising and other content of said newspaper is delivered to . . . Pulitzer . . . for printing, to the point where delivery of the Globe-Democrat . . . is made at the truck side of the loading dock" (R. 142-143, 147-149). Pulitzer agreed to hire as additional personnel only such Globe-Democrat employees as it actually needed, and declined to obligate

itself to former Globe-Democrat employees for any services rendered prior to employment with Pulitzer (R. 149):

> . . . Pulitzer . . . agrees that it will employ any additional persons which it may need in order to print Globe-Democrat ['s] . . . newspaper from the present employees of Globe-Democrat . . . if available, but shall not be obligated to employ any of the employees of Globe-Democrat . . . whose services are not actually needed by it. . . . Pulitzer shall not be obligated to pay to any person formerly employed by Globe-Democrat . . . wages, pensions or other benefits, or severance pay for services rendered to Globe-Democrat . . . prior to the date on which such person is employed by . . . Pulitzer. . . .

On February 27, 1959, the same day that it entered into its agreement with Pulitzer, Globe-Democrat "gave notice of the *consolidation of mechanical operation* of . . . Globe-Democrat . . . and Pulitzer . . ." (R. 20, 5-6, emphasis supplied). The publisher of Globe-Democrat on that day wrote to its employees informing them that "the Globe-Democrat will be printed by the Post-Dispatch, when and if the Guild strike is settled" (R. 120, 121). He observed that "The *consolidation of mechanical operations between competing newspapers* finds great precedent in many cities throughout America, a list which we suspect may grow larger in the future as the mechanical costs of publishing a daily newspaper continue to rise" (R. 122, emphasis supplied). As to employment of the mechanical crafts no longer required by Globe-Democrat, he stated that (R. 122):

> Members of the mechanical unions will be employed on a priority basis in the *consolidated*

mechanical operation. If they all cannot be employed, *the dismissal provisions of the current mechanical contracts will apply.* [Emphasis supplied.]

On June 2, 1959, printing of the Globe-Democrat by Pulitzer having evidently been begun by then, Pulitzer issued a "Statement of Policy Relating to NEW Employees Who Were Formerly Employed by . . . Globe-Democrat . . ." (R. 96, 330, def. ex. C). The statement emphasized that the status of former Globe-Democrat employees hired by Pulitzer is that of "new" employees (def. ex. C):

> 1. *New Employees*—All persons who were formerly employed by . . . Globe-Democrat and who may be employed by . . . Pulitzer . . . in any capacity shall be "new" employees of . . . Pulitzer . . . . This Company has no connection with . . . Globe-Democrat . . . whatever except that it has agreed to print the St. Louis Globe-Democrat on a contract basis in this Company's newspaper printing plant. . . . Pulitzer is under no obligation to employ any particular person or any number of persons formerly employed by . . . Globe-Democrat . . ., but has agreed to select such *new* employees as it might need from qualified former employees of . . . Globe-Democrat . . . if available. [Emphasis in original.]

The statement stressed that eligibility for severance pay with Pulitzer would be based solely on service while in Pulitzer's employ (def. ex. C):

> 8. *Severance Pay*—In the event that a former employee of . . . Globe-Democrat . . . shall become eligible to dismissal or severance pay after employment as a *new* employee of . . . Pulitzer . . . under any contract between . . . Pulitzer . . . and the Unions only actual service of the employee

> while in the employ of . . . Pulitzer . . . shall be taken into consideration in the computation of the amount of such dismissal or severance pay. [Emphasis in original.]

The two-page statement used the words "new employees" eighteen times and emphasized the "new" by underlining it. Those printers formerly employed by Globe-Democrat who were hired by Pulitzer were placed at the bottom of the Pulitzer priority list (R. 98, 113-114).

None of the petitioners performed any work for, received any compensation from, or were called back to work by Globe-Democrat after February 27, 1959 (R. 32, 43). None remained in Globe-Democrat's employ (R. 196, 203-204).

Petitioners through the Union made demand upon Globe-Democrat for severance pay as provided in the collective bargaining agreement, but Globe-Democrat refused to pay (R. 7, 20). Action to compel payment was instituted (R. 1). Upon similar demands and refusals based on like contractual provisions involving the paper handlers, stereotypers, and mailers, whose employment by Globe-Democrat was terminated in the same way as the printers', the members of these mechanical crafts also instituted suit against Globe-Democrat to recover severance pay.[1] In its answer in

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[1] *Monterosso* v. *St. Louis Globe-Democrat Publishing Co.*, 368 S.W. 2d 481, certiorari pending, No. 414, October Term 1963 (mailers); *Allen* v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 460 (stereotypers); *Irwin* v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 452, certiorari pending, No. 415, October Term 1963 (paper handlers).

The theory of the action varied among the several cases. In this case the action was tried on the theory that the arrangement

the paper handlers' suit, read into evidence at the trial of the instant printers' action, Globe-Democrat explicitly admitted that the "arrangement between defendant [Globe-Democrat] and Pulitzer Publishing Company was *within the meaning of Article XII, Section 1* [of the collective bargaining agreement], a merger or a consolidation of the mechanical functions of the two publishers . . ." (R. 232-234, 238, emphasis supplied).

Petitioners' action was tried to a jury. The trial court charged the jury that, as a matter of law, (1) the severance pay provision indemnified the employees for loss of employment with Globe-Democrat, and (2) acquisition of employment elsewhere following loss of employment with Globe-Democrat was irrelevant to petitioners' entitlement to severance pay (R. 491-493). The trial court submitted to the jury for their finding the questions *inter alia*, whether (1) "there was a merger, consolidation or permanent suspension of publication by Defendant [Globe-Democrat] as set out in Article XI, paragraph 2 of the aforesaid collective bargaining agreement," and whether (2) petitioners, "or any of them, lost employment thereby with Defendant [Globe-Democrat]" (R. 491-492). In submitting these questions to the jury, the trial court refused requests for directed verdicts by both petitioners

between Globe-Democrat and Pulitzer resulted in a "merger, consolidation or permanent suspension of publication." The theory in the mailers' action, *Monterosso*, was that the arrangement resulted in a "consolidation"; in the stereotypers' action, *Allen*, a "permanent suspension of publication"; and in the paper handlers' action, *Irwin*, a layoff "to reduce the force." This case, *Allen*, and *Irwin* were tried to a jury. *Monterosso* was tried to the court without a jury. At the *nisi prius* level, the employees won the three cases tried to a jury and lost the one case tried to a court without a jury. On appeal the employees lost all four cases.

and respondent, as well as requested instructions by each, which would have ruled these questions as matters of law (R. 469-470, 474-478, 485-487). The trial court's thinking is revealed by its remark that (R. 69):

> Gentlemen, the defendant's interpretation of the words publication and printing as urged by the respective parties constitute one of the very contested issues in this case. While such words may have a different meaning to the Court, yet such meaning evidently is not too compelling that reasonable minds may not differ. It's only when reasonable minds may not differ that the Court may as a matter of law rule the question. For that reason, as of this time the Court will rule that that constitutes a matter of fact for the Jury.

And, referring to consolidation or merger, the trial court observed that "you have no corporate consolidation . . . . You have no corporate merger. You have a suspension in this case, and, of course, it's a hybrid thing . . . . [I]t has been a jury question all along . . ." (R. 271).

The jury returned a verdict for petitioners for $234,707.80, plus interest, and judgment was rendered accordingly (*infra*, p. 2a).

On appeal, the judgment was reversed, the Missouri Supreme Court holding that respondent's motion for a directed verdict at the close of the evidence, based upon failure of proof, should have been sustained (*infra*, p. 19a). This conclusion was based on that court's determination that the words "merger" or "consolidation," as used in the collective bargaining agreement, can mean only "corporate merger or consolidation," and that the words "permanent suspen-

sion of publication," as used in the collective bargaining agreement, can only mean "GOING OUT OF BUSINESS AS THE PUBLISHER OF A NEWSPAPER" (*infra*, p. 14a). The court below did not disturb the conclusion that petitioners had suffered a loss of employment with the Globe-Democrat.

Petitioners filed a motion for rehearing, or, in the alternative, to transfer the cause to the court en banc (R. 689-729). Central to this motion was petitioners' claim that, in disregard of Section 301(a) of the Labor Management Relations Act, 1947, the court below applied local law instead of applicable federal substantive law in its interpretation of the collective bargaining agreement (R. 691-695, 699-701-715, 727-728). In denying the motion, the court below stated that "We will consider the matter . . ." (*infra*, p. 21a), but concluded that its determination did not conflict with federal law (*infra*, pp. 21a-22a).

In companion decisions the court below also rejected the claims of the mailers, sterotypers, and paper handlers for severance pay (*supra*, p. 9, n. 1).

REASONS FOR GRANTING THE WRIT

The fundamental questions presented by this petition pertain to the role of a jury verdict in the enforcement of a collective bargaining agreement within the purview of section 301(a) of the Labor Management Relations Act, 1947; and, independently of the jury verdict, the correct formulation and application of federal standards governing the interpretation and enforcement of such an agreement.

Significant in themselves, the questions have added importance because they arise in the context of a pro-

vision of an agreement which has widespread incidence in the newspaper industry throughout the United States. A survey conducted by the Contract Division of the International Typographical Union, the parent body of the local union which is the party to the agreement in this case, shows that identical or similar provisions appear in agreements applicable to sixty-five newspapers located in 27 cities covering more than 16,300 journeymen.[2] Illustrative of their nationwide scope, these provisions prevail in such major metropolitan areas as New York, Chicago, Boston, New Orleans, Philadelphia, Cleveland, Los Angeles, and San Francisco (*infra*, pp. 46a-51a, 52a, 54a).[3] Definitive determination of the legal status of this standard and widespread provision is therefore important. This case thus presents questions of intrinsic legal significance in an economic setting of national consequence.

I.

1. As the collective bargaining agreement in this case is "between an employer and a labor organization representing employees in an industry affecting commerce" within the meaning of section 301(a) of the

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[2] Appendix F, *infra*, pp. 46a-57a, sets forth the specific provision of the agreement, the ITU local union which is the party to it, the number of newspapers to which it is applicable, the number of employees covered by it, and the location.

[3] The widespread scope of the provision is further evidenced by the requirement of the General Laws of the International Typographical Union that "Subordinate unions shall incorporate in PROPOSED contracts a clause providing for . . . severance pay of not less than two weeks' pay for each year of priority in the office of all journeymen affected by suspensions or mergers . . ." (pl. sub. ex. 1A, art. III, sec. 13, pp. 87-88).

Labor Management Relations Act, 1947,[4] it "is a federal contract. . . ." *International Association of Machinists* v. *Central Airlines*, 372 U.S. 682, 692. Its interpretation is governed exclusively by federal substantive law. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 451, 456-457. Even if, as here, the action is instituted in a state court rather than a federal court (*Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95), and is brought by the individual employees rather than their union (*Smith* v. *Evening News Association*,

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[4] Newspaper publication is of course "in an industry affecting commerce." *Smith* v. *Evening News Association*, 371 U.S. 195; *Associated Press* v. *N.L.R.B.*, 301 U.S. 103, 125-129; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178; *Hearst Publications* v. *N.L.R.B.*, 136 F. 2d 608, 610 (C.A. 9), affirmed in this respect, 322 U.S. 111. The National Labor Relations Board has found that Globe-Democrat itself is a company "engaged in commerce within the meaning of the National Labor Relations Act." *Pulitzer Publishing Co.*, 57 NLRB 1696, 1698. It has reached the same conclusion as to Pulitzer. *Id.* at 1697-98. Moreover, the collective bargaining agreement in this case recognizes in terms the applicability of federal law to the operations covered by the agreement (pl. sub. ex. 1, pp. 2, 45, 46), and refers in terms to Globe-Democrat's use of the wire services of Associated Press, United Press, and International News Service (*id.* pp. 7, 10) and its publication of national advertisements (*id.* pp. 36-37): matters specifically called to the attention of the court below on the motion for rehearing (R. 702). That court in its opinion on rehearing plainly accepted the obvious fact that the agreement was between an employer and a union representing employees in an industry affecting interstate commerce (*infra*, pp. 19a-23a). The facts which may be judicially noticed, as well as those which affirmatively appear of record, thus amply establish the applicability of section 301(a); and since the facts do sufficiently show the requisite jurisdictional element, it makes no difference that it was not formally pleaded. *Norton* v. *Larney*, 266 U.S. 511; *Sun Printing and Publishing Assn.* v. *Edwards*, 194 U.S. 377. To question whether the agreement in this case is one between an employer and a union representing employees in an industry affecting interstate commerce would therefore be the sheerest cavil.

371 U.S. 195), the "dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute" (369 U.S. at 103; see also 371 U.S. at 199-201). Regardless of forum or suitor, federal law, not state law, controls the collective bargaining agreement.

2. These are by now commonplaces. The novel and important question is whether, as is true of other federal rights whose vindication is determinable by jury verdict, LMRA § 301 contract rights are protected by the doctrine that a jury verdict is to stand if the determination is supported by the evidence with reason. Whether the issue is the sufficiency of the consideration to support a release (*Maynard* v. *Durham and So. Ry. Co.*, 365 U.S. 160, 163), employee status (*Baker* v. *Texas & Pac. Ry. Co.*, 359 U.S. 227), causation (*Rogers* v. *Missouri Pac. R.R. Co.*, 352 U.S. 500), negligence (*Wilkerson* v. *McCarthy*, 336 U.S. 53), or any other, the pith of the idea is the inviolability of a jury verdict which has a reasonable basis in the evidence. "We may assume that the jury could properly have reached the court's conclusion. But, as the probative facts also supported with reason the verdict favorable to the petitioner, the decision was exclusively for the jury to make." *Rogers* v. *Missouri Pac. R.R. Co.*, 352 U.S. 500, 504. "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination." *Id.* at 509.[4a]

[4a] See also, *Gallick* v. *Balt. & Ohio R.R. Co.*, 372 U.S. 108; *Basham* v. *Pennsylvania R.R. Co.*, 372 U.S. 699; *Moore* v. *Terminal R.R. Assn.*, 358 U.S. 31; *Jacob* v. *New York*, 315 U.S. 752. Compare, *Atlantic* and *Gulf Stevedores* v. *Ellerman Lines*, 369 U.S. 355.

3. The vigilance exercised by this Court to safeguard the integrity of a jury verdict in cases under the Jones Act and Federal Employers' Liability Act should apply equally to cases under section 301(a) of the Labor Management Relations Act, 1947. Unless the parties choose arbitration or waive a jury, an action to recover money damages for alleged breach of an LMRA § 301 contract is triable as of right to a jury. In this case, observing that the rival interpretations of the agreement are "not too compelling that reasonable minds ma not differ", and freely admitting extrinsic evidence to aid in the resolution of ambiguity, the trial court treated the interpretation of the agreement as "a matter of fact for the jury", a "jury question all along", and submitted it to the jury for its determination (*supra*, p. 11). The trial court was unquestionably correct. "Insofar as it was uncertain or ambiguous, the true meaning of the . . . agreement . . . should have been left to the jury." *United States* v. *Taylor*, 293 F. 2d 717, 722 (C.A. 5). For, reiteration that "the interpretation of written instruments properly belongs to the court, and not to the jury" yields to the proposition that "there certainly are cases which, from the different senses of the words used, or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties." *Brown & Co.* v. *M'Grau*, 14 Pet. 479, 493. This is indeed "well settled." *West* v. *Smith*, 101 U.S. 263, 270.[5] Petitioners had "a right to have

[5] See also, *Rankin* v. *Fidelity Ins. T. & S.D. Co.*, 189 U.S. 242, 252-254; *Gerhart* v. *Henry Disston and Sons*, 290 F. 2d 778, 784, 792 (C.A. 3); *Pike Rapids Power Co.* v. *Minn., St. Paul, & S.S. M.R. Co.*, 99 F. 2d 902, 916 (C.A. 8); Williston, Contracts, § 616, p. 652 (3d ed., 1961); 3 Corbin, Contracts, § 554 (1960); Anno., Jury Question, Meaning of Contract, 65 A.L.R. 648.

the jury determine . . . just what the contract is." *Dairy Queen* v. *Wood*, 369 U.S. 469, 479.

4. This case is an eminently suitable vehicle to decide the question whether the principle of inviolability of a jury verdict reasonably founded in evidence is applicable to an action on an LMRA § 301 contract. For, to say the least, the "proofs justify with reason" (*Rogers* v. *Missouri Pac. R.R. Co.*, 352 U.S. 500, 506) the jury's verdict. Thus:

(a) The court below holds that severance pay is due for loss of employment with Globe-Democrat resulting from corporate merger or consolidation, or from going out of business as a newspaper publisher, but not from ceasing the printing of the newspaper. This dichotomy is at war with the central purpose of the severance pay provision. Defined by the agreement as an "earned equity" (*supra*, pp. 4-5), the objective of severance pay is to ease the burden of anticipated loss of earnings while looking for another job, to compensate for loss of seniority rights and possible pension rights, to provide the wherewithal for retraining or acquiring new skills, and to maintain the good will of the employees and the community.[6] These reasons for severance pay apply with identical force whether the separated worker loses his job through corporate merger or consolidation, going out of business, or ces-

[6] Collective Bargaining Provisions: Discharge, Discipline, and Quits; Dismissal Pay Provisions, Bull. No. 908-5, U.S. Dept. of Lab., Bur. Lab. Stat., 34 (1948); Chase and Nix, *Dismissal-Pay Provisions in Union Agreements*, 1949, 70 Monthly Lab. Rev. 384 (1950); *Ackerson* v. *Western Union Tel. Co.*, 234 Minn. 271, 48 N.W. 2d 338; *Owens* v. *Press Publishing Co.*, 20 N.J. 537, 120 A. 2d 442; *Adams* v. *Jersey Central Power & Light Co.*, 21 N.J. 8, 120 A. 2d 737.

sation of printing. To say that severance pay is due under the agreement in the first two instances, but not in the third, is to impute to the parties a purposeless incongruity. The incongruity is especially marked in that, according to Globe-Democrat itself, the "consolidation of mechanical operations between competing newspapers finds great precedent in many cities throughout America, a list which we suspect may grow larger as the mechanical costs of publishing a daily newspaper continue to rise" (*supra*, p. 7). The parties would hardly have omitted from the severance pay provision a major cause of job loss in the newspaper industry.

The jury's verdict, but not the appellate court's displacement of it, therefore renders an interpretation of the severance pay provision which fulfills its manifest purpose. It goes without saying that an agreement is to be interpreted so as to realize its purpose.[7] And a collective bargaining agreement, as a code for the governance of an industrial enterprise, is in particular to be read in the light of its aim. "In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 567. See also, *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578-581; *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 105.

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[7] Corbin, Contracts, § 545 (1960); Restatement, Contracts, § 236(b).

(b) Globe-Democrat itself recognized that the contractual words "merger, consolidation or permanent suspension of publication" fully embrace cessation of printing by Globe-Democrat and undertaking by Pulitzer to print both papers using the best equipment of both publishers. In its written notice of February 27, 1959, to the employees, Globe-Democrat stated that (*supra*, pp. 7-8):

> Members of the mechanical unions will be employed on a priority basis in the consolidated mechanical operation. If they all cannot be employed, *the dismissal provisions of the current mechanical contracts will apply.* [Emphasis supplied.]

On the same day, at a meeting of representatives of all the mechanical crafts, the publisher of Globe-Democrat stated that "the Post-Dispatch [Pulitzer] would hire what they needed of the former Globe-Democrat members and *those who were not employed by the Post-Dispatch would receive severance pay*" (R. 45, emphasis supplied).

While these statements mistakenly represented that contractual eligibility for severance pay depended on failure to secure employment with Pulitzer, the statements were nonetheless unambiguous in their acknowledgment that cessation of printing by Globe-Democrat and undertaking of printing for both by Pulitzer were in the contractual sense a "merger, consolidation or permanent suspension of publication". For, were they not, there would be utterly no basis for the statement that "the dismissal provisions of the mechanical contracts will apply." In the instant situation the dismissal provisions apply only "In the event of

merger, consolidation or permanent suspension of publication."[8]

Clarity is made doubly plain by Globe-Democrat's admission in its answer in the action instituted by the paper handlers to recover severance pay (*supra*, pp. 9-10). As with the printers' contract, Article XII, Section 1, of the paper handlers' contract provided for severance pay "in the event of merger, consolidation or permanent suspension of publication . . ." (R. 233). Globe-Democrat explicitly admitted that the "arrangement between defendant [Globe Democrat] and Pulitzer Publishing Company was *within the meaning of Article XII, Section 1*, a merger or a consolidation of the mechanical functions of the two publishers . . ." (*supra*, p. 10, emphasis supplied.)[9] It would be hard to admit more clearly that the contractual words cover the event in question.

In interpreting a collective bargaining agreement this Court has placed great weight on the construction

[8] Aside from merger, consolidation, or permanent suspension of publication, the agreement also provides for severance pay in the event of lay-off to reduce force, but in a different amount (*supra*, p. 4). Taken as a whole, therefore, the design of the agreement is to confer severance pay benefits in the case of separation from employment for any reason except voluntary resignation or discharge for cause. It is thus typical of severance pay provisions generally prevalent in collective bargaining agreements in that "a sum of money . . . [is] paid to an individual whose employment is terminated through no fault of his own." Chaso and Nix, *Dismissal-Pay Provisions in Union Agreements, 1949*, 70 Monthly Lab. Rev. 384 (1950).

[9] To be sure, Globe-Democrat further averred that "none of the plaintiffs lost employment thereby and they therefore are not entitled to dismissal pay" (R. 238). The trial court's instructions and the jury's verdict, undisturbed in this respect by the court below, decided the latter contention adversely to Globe-Democrat (*supra*, pp. 10-11).

which a party itself put on the agreement. *Drake Bakeries* v. *Local 50, Bakery Workers*, 370 U.S. 254, 260. Surely in this case the jury was entitled to do no less.

(c) The court below nevertheless holds that the contractual words "merger, consolidation or permanent suspension of publication" are incapable of an interpretation covering cessation of printing by Globe-Democrat and undertaking by Pulitzer to print both papers. This conclusion not only disregards the manifest purpose of the severance pay provision and respondent's own construction of the terms of the agreement but rests upon a rigid reading of words which lexicon itself does not allow.

Merger or consolidation means at least corporate merger or consolidation. But the court below rules that it means *only* corporate merger or consolidation. This *ipse dixit* rests on the court's view that "When words with a well-defined meaning are used in a contract referring to a corporation it is reasonable *to assume* that they are used by the contracting parties in the sense ordinarily ascribed to them in the field of corporate law" (*infra*, p. 15a, emphasis supplied). But it is at least as reasonable to assume that when words are used in a labor agreement the parties ascribe to them the sense relevant to handling a labor problem in the labor field. Severance pay constitutes partial compensation for the injury caused by the loss of a job (*supra*, p. 17). The job loss pertinent to this agreement is the job of a printer working in the composing room of the Globe-Democrat. The contractual words "merger" or "consolidation" relate therefore to jobs in a composing room. In this context these words describe equally aptly either unification of the

separate composing rooms of two corporations or unification of their separate corporate entities. For, since the printer can lose his job just as readily from one arrangement as from the other, there is not the least reason to confine the words "merger" or "consolidation" to corporate combination and to exclude from their purview composing room combination. The utter naturalness of reading the words to embrace both situations is illustrated by Globe-Democrat's reiterated description of its arrangement with Pulitzer as a "*consolidation* of mechanical operation . . ." (*supra*, pp. 7-8, 10, emphasis supplied).

The same artifically restricted reading is present in the court's conclusion that the words "permanent suspension of *publication*" cannot embrace "permanent suspension of *printing*" (*infra*, p. 17a, emphasis supplied). This conclusion was based on the cited opinion of another division of the court below in adjudicating the companion claim of the stereotypers (*infra*, p. 17a). The other division, while reaching the same conclusion as the division which decided this case, nevertheless observed that "it may reasonably be said that the phrase ['permanent suspension of publication'] is fairly susceptible to different constructions . . ." *Infra*, p. 29a; *Allen* v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 460, 463. It noted that, "in at least three court cases it has been stated that by reason of the particular attending circumstances 'publish' and 'print' may be construed to mean the same." *Infra*, p. 34a; *id.* at 466. Thus, Webster's Third New International Dictionary (1960), in defining "publish," notes that "print" is a specific usage of the word "publish." Similarly, Webster's New International Dictionary, 2d ed. (1959), in defining "publish,"

states: "PRINT, PUBLISH are often confused." There is thus nothing in the word "publication" which inexorably precludes reading it to mean "printing." Whether "suspension of *publication*" means "suspension of *printing*" is therefore a question of what interpretation is appropriate in the context in which the words were used. And that question virtually answers itself. For the work of the printer in the composing room is printing. He loses his job when printing is suspended. That the newspaper can be issued without use of his services as a printer is totally irrelevant to his situation and to the reason that the contract has made provision for severance pay on his behalf. Accordingly, given the framework within which the words are to operate, "suspension of publication" is easily read as "suspension of printing."

(d) These considerations illustrate but do not exhaust the reasonable basis in the evidence for the jury's verdict. The principle of the inviolability of a jury verdict supported with reason by evidence, applicable to vindicate other federal rights and which should also be applied to vindicate LMRA § 301 contract rights, requires in this case that jury's verdict stand because justified by the proofs with reason.

II

Apart from the jury's verdict, considered as a matter for independent judicial determination, what we have already stated shows that the agreement is correctly interpreted to require the payment of severance pay for loss of employment resulting from the arrangement between Globe-Democrat and Pulitzer. The explication of this conclusion would present the Court with

an exceptionally suitable vehicle for demonstrating how a collective bargaining agreement should be interpreted. Except for probing the no-strike and arbitration commitments, this Court has had little occasion to explore the content of the collective bargaining agreement. This case presents in clear and telling fashion the interplay of purpose, practical construction, and literalism. In the discharge of the Court's responsibility to fashion a body of federal substantive law for the interpretation and enforcement of collective bargaining agreements, this Court's unfolding of the ramifications of this agreement would provide meaningful guidance in the interpretation of the generality of collective bargaining agreements. Furthermore, since the particular provision whose interpretation is at issue in this case is typical in the newspaper industry throughout the United States (*supra*, p. 13, *infra*, pp. 46a-57a), definitive determination of its legal status is important on its own account.

III

The questions presented by this petition—the province of the jury in the interpretation of the agreement and the correct formulation and application of the principles pertinent to the interpretation of the agreement independently of the jury—were put in issue in the trial court by motions for directed verdict, requested instructions, and the charge to the jury (*supra*, pp. 10-11). On appeal, petitioners argued with particularity that the judgment should be affirmed either on the premise that the verdict reached by the jury was within its province as the trier (R. 631-632, 633-644) or on the premise that the judgment rested on a correct interpretation of the agreement considered as

a matter for independent judicial determination (R. 608-631). Accordingly, pretermitting for the moment the failure to denominate the questions as federal in nature until the motion for rehearing, there is no doubt that the questions which are presented by this petition were raised and preserved below at the trial and appellate levels.

It is true, however, that not until the motion for rehearing or to transfer the cause to the court below *en banc* was there specific advertence to section 301 (a) of the Labor Management Relations Act, 1947, and the effect exerted by that section in creating federal law controlling the interpretation and enforcement of the agreement (R. 691-695, 699, 701-715, 727-728). While the federal orientation of the questions which had been timely raised was thus not specifically urged until the motion for rehearing, the short answer to a contention that this was too late is that the court below nonetheless entertained and decided the merits of the federal claim in denying the motion. Thus, in its opinion denying the motion, the court below stated that "*We will consider the matter . . .*" (*infra*, p. 21a, emphasis supplied), and concluded on such consideration that the decision it had reached did not conflict with federal law (*infra*, pp. 21a-22a). Similarly, in contemporaneous opinions issued the same day denying companion motions filed by the sterotypers and paper handlers, another division of the same court stated that "we shall examine the contention, presented now for the first time, that we erred in not ruling the case pursuant to 'federal substantive law'" (*infra*, pp. 37a, 41a), and concluded upon such examination that "plaintiffs certainly have not demonstrated that we

reached an incorrect result."[10] *Infra*, pp. 37a-39a, 41a-43a; *Irwin* v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 452, 458-459; *Allen* v. *Globe-Democrat Publishing Co.*, 368 S.W. 2d 460, 468-469.

Thus, there was actual entertainment and decision of the federal claim by the court below, and this action forecloses any contention that the federal question may not be urged before this Court. "A federal question advanced for the first time in a petition for rehearing filed in the highest state court in which decision could have been had is deemed to have been properly and timely raised if that court entertains the petition and affirmatively decides the federal question." Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, § 84 (Wolf and K[illegible] ed. 1951); and

[10] The same division of the court below (Division One) that decided this case also decided *Monterosso*, the mailers' action, and in *Monterosso* the opinion on rehearing cited Division One's contemporaneous rehearing opinion in this case, *Ackerman*, as well as the contemporaneous rehearing opinion of the *other* division (Division Two) in *Irwin* (*infra*, p. 45a). By invoking the rehearing opinion of Division Two, Division One plainly adopted Division Two's statement that "We may, in our discretion, consider plain error affecting substantial rights, . . . and on that discretionary basis *we shall examine the contention* . . ." (*infra*, pp. 37a, 41a, emphasis supplied). There is thus no question that the division in this case did decide the federal question on rehearing.

The rehearing opinion below, in discussing the merits of the federal question, concluded with the statement that its decision was consitent with federal law "*Assuming* that we are obliged to follow and apply federal substantive labor law and policy . . ." (*infra*, p. 22a, emphasis supplied). Any other assumption would have squarely collided "with applicable decisions of this court." Rule 19(1)(a), Supreme Court Rules; *supra*, pp. 14-15. But that the obligation to follow federal law is still grudgingly entertained as an assumption only indicates that the decision on the merits of the federal question by the court below is inconsonant with federal precepts of labor law.

see, *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 138. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436; and see, Robertson & Kirkham, *supra*, § 83.[11]

Furthermore, apart from the conclusive effect of the actual consideration and decision of the federal questions by the court below, the failure to specify their

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[11] The denial by the court below of the motion to transfer the cause to it *en banc* of course does not mean that the court below did not decide the federal questions on the alternative motion for rehearing. While the Constitution of the State of Missouri confers the right to an *en banc* rehearing in any case originally decided by a division of the court "when a federal question is involved" (*Gorman* v. *Washington University*, 316 U.S. 98; *cf.*, *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 98-101), the view of the Missouri Supreme Court as to the constituents of a federal question for the purpose of an *en banc* transfer is much narrower than the constituents of a federal question for the purpose of this Court's jurisdiction. Thus, the Missouri Supreme Court holds that interpretation or application of a federal statute or regulation does not involve a federal question for the purpose of *en banc* transfer (*McAllister* v. *St. Louis Merchants' Bridge Terminal Ry. Co.*, 324 Mo. 1005, 25 S.W. 2d 791, 792-793; *Huckleberry* v. *Missouri Pac. R. Co.*, Mo. Sup., 26 S.W. 2d 980, 987-988; *Pashea* v. *Terminal R.R. Assn. of St. Louis*, 350 Mo. 132, 165 S.W. 2d 691, 696), although such an issue presents a classic federal question for the purpose of this Court's jurisdiction, and is precisely the kind of federal question presented in this case. Recognizing that denial of a motion for *en banc* transfer does not mean that a federal question for federal jurisdictional purposes has not been decided, this Court has reviewed on the merits judgments of the court below rendered by a division after denial of *en banc* transfer by the division. *Moore* v. *Terminal R.R. Assn.*, 358 U.S. 31, reversing, 312 S.W. 2d 769; *Rogers* v. *Missouri Pac. R.R. Co.*, 352 U.S. 500, reversing, 284 S.W. 2d 467. Where an *en banc* transfer is denied the judgment of the division is of course that of the highest court of the state in which a decision could be had. 28 U.S.C. § 1257. Accordingly, in this case, no implication adverse to jurisdiction in this Court can be drawn from denial of *en banc* transfer.

federal character earlier than rehearing was in any event justifiable in the circumstances of this case. This action was instituted at a time when *Association of Westinghouse Salaried Employees* v. *Westinghouse Corp.*, 348 U.S. 437, was the ruling decision. Under the teaching of *Westinghouse*, section 301 did not cover an action to enforce rights conferred by a collective bargaining agreement which were individual and personal to the employee. A suit to recover severance pay due an employee would be such an action. Thus, in this case, so long as *Westinghouse* prevailed, it would have been purposeless to advance a federal claim in terms. Not until *Smith* v. *Evening News Association*, 371 U.S. 195, decided December 10, 1962, was it finally determined that the *Westinghouse* "holding is no longer authoritative as a precedent." *Id.* at 199. Meanwhile, the instant action had been brought, tried, and appealed, the appeal having been taken by respondent (appellant below) on January 11, 1962 about eleven months before *Smith* v. *Evening News Association* was decided (R. 516), with briefs filed by respondent on November 24, 1962 (R. 522), and by petitioners on January 12, 1963 (R. 561). While it is arguable that, *Smith* v. *Evening News Association* having been decided one month before petitioners' brief was filed in the court below, the federal question should have been articulated in that brief,[12] diligence did not require specification at that time in view of the recency of this Court's decision, the possibility of a rehearing in it, and the advanced stage of the state appeal. Rather, the doctrinal shift worked by *Smith* v. *Evening News*

[12] But compare Stern and Gressman, Supreme Court Practice, 100 (3d ed. 1962): "Briefs and oral arguments before state courts are not ordinarily part of the record filed with the Supreme Court and cannot be used to establish that a federal question was raised."

Association made the petition for rehearing the first fully appropriate occasion to focus the federal questions. Thus, while not precisely encompassed by it, this case is fairly within the "surprise" principle that a federal claim asserted for the first time upon a petition for rehearing is timely if tender at that stage was caused by an unexpected ruling bringing the federal claim to the fore and making rehearing the first adequate opportunity to present it.[13]

Finally, the absence of earlier designation of the claims as federal is in this case altogether formal. By reason of section 301 a federal question is inherent in the interpretation and enforcement of a collective bargaining agreement in an industry affecting interstate commerce. Decision of a disputed issue of interpretation or enforcement of necessity involves a controlling federal question because the relevant law is exclusively federal. In this case the specific reasons in support of petitioners' claim—the province of the jury and the correct formulation and application of the standards of contract interpretation independently of the jury—were advanced with particularity from the outset of the litigation. All that lacked until rehearing was their formal designation as federal. This omission makes no difference because, despite the absence of formal federal denomination, the bundle of considerations relevant to decision of the claim was in fact presented, considered and determined. The claim being in fact federal, and the specific considerations

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[13] *E. g., Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-678; Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, §§ 76, 78 (Wolf. & Kur. ed. 1951); Stern & Gressman, Supreme Court Practice, 99 (3d ed. 1962).

relevant to the claim having been in fact presented and decided, no more is required.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October, 1963.

APPENDIX A

Judgment

49308

MEYER ACKERMAN et al., *Respondents*

v.

GLOBE-DEMOCRAT PUBLISHING COMPANY, a corporation, *Appellant.*

Appeal From The Circuit Court of St. Louis City

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis City rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant recover against the said respondents costs and charges herein expended, and have execution therefor. (Opinion filed.)

[Entered April 8, 1963, R. 671].

APPENDIX B

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

January Session, 1963

No. 49,308

MEYER ACKERMAN, et al., *Respondents*,

v.

GLOBE-DEMOCRAT PUBLISHING COMPANY, a Corporation, *Appellant*.

Appeal From The Circuit Court of The City of St. Louis

HONORABLE WILLIAM E. BUDER, *Judge*.

This is an action by 154 members of St. Louis Typographical Union No. 8 against Globe-Democrat Publishing Company, a corporation, which is engaged in the business of publishing a daily newspaper in St. Louis known as the "St. Louis Globe-Democrat," for severance pay under a collective bargaining contract. A jury in the Circuit Court of the City of St. Louis returned a verdict for plaintiffs for $234,707.80 plus interest. Judgment was rendered accordingly. Defendant appealed.

The union, an unincorporated labor organization, was the designated and recognized sole bargaining agent of all Globe-Democrat employees engaged in composing room work. The union and the corporate publisher will be referred to as "Union" and "Globe-Democrat."

On June 17, 1958 Union and St. Louis Newspaper Publishers' Association (consisting of the two corporations which publish the St. Louis Post-Dispatch and the St. Louis Globe-Democrat) entered into a written collective bargaining agreement for the period January 1, 1958 to December 31, 1959, providing the hours, wages and other terms and conditions of employment of plaintiffs by Globe-Democrat.

We have italicized the portion of the article of the agreement which forms the contractual basis of this action:

"ARTICLE XI

Severance Pay

"1. Situation holders laid off to reduce the force shall receive severance pay of one week's pay for each year of continuous priority.

"2. *In the event of merger, consolidation or permanent suspension of publication by any newspaper covered by this contract, all employes who lose employment thereby shall receive severance pay* as follows:

"Employes having six months priority standing, six (6) weeks' pay.

"Employes having one year or more priority standing, twelve (12) weeks' pay.

"3. Such severance pay shall be at the employe's regular straight time rate of pay. Priority standing shall be as recorded on the books of chapel officers at the time of such lay off, suspension, merger or consolidation."

On February 21, 1959 the St. Louis Newspaper Guild, a union not affiliated with the typographical union, struck against Globe-Democrat and established a picket line. Plaintiffs, typographical union members, who had been working at Globe-Democrat on various shifts, and all other mechanical craft employees, refused to cross the Guild picket line. By a provision of the contract each of these plaintiffs had a right to refuse to cross the picket line without being disciplined therefor, but without payment for time lost. The publisher of the Globe-Democrat that day sent a letter to all employees saying "I regret very much that the Globe-Democrat will not be able to publish its Sunday edition because of a strike by the St. Louis News-

paper Guild. It does not appear probable that publication will be resumed in the immediate future."

About 3 o'clock a.m. on February 22 the Globe-Democrat delivered a letter to the Union president saying: "Any employee member of your union who presented himself for duty at his accustomed place of work in the Globe-Democrat building composing room today or does so Sunday, February 22, 1959, will be put to work and paid his regular day's pay at the straight time rate. This condition also applies to regular situation holders who are members of your union, who continue to report for duty at the Globe-Democrat building at their accustomed place of work on their regular work days and hours until the work stoppage caused by the St. Louis Newspaper Guild is ended or until further notice." On February 27, 1959 Globe-Democrat sold its building, printing plant, machinery, equipment and other personal property to Pulitzer Publishing Company, publishers of the St. Louis Post-Dispatch, under an agreement by which Pulitzer agreed to print the Globe-Democrat for ten years from February 27, 1959, beginning the date the Globe-Democrat was prepared to resume publication following settlement of the then-existing strike of its Guild employees. This agreement provided, among other things, that "both parties are desirous of retaining their separate identities and their separate news, advertising, circulation and editorial policies" so as to present to the public more than one coverage and opinion of public affairs by two independent newspapers. Pulitzer agreed to pay all printing expenses from the point where the copy was received to delivery of the printed newspapers at the truck side of the loading dock, where Globe-Democrat would accept and be responsible for their delivery. Globe-Democrat was to maintain in its own separate quarters its own business, advertising, circulation, news and editorial departments and pay all expenses up to delivery of the material for printing and all expenses of delivery of newspapers from the loading dock. Globe-

Democrat was to be responsible for all wages or other obligations incurred prior to date Pulitzer began printing the Globe-Democrat and Pulitzer was to be liable only for wages, etc. incurred in the *printing* of the Globe-Democrat after said date. Pulitzer agreed to employ any additional persons it might need to print the Globe-Democrat "from the present employees of Globe-Democrat Publishing Company if available, but shall not be obligated to employ any of the [said employees] whose services are not actually needed by it."

On the same day the publisher of Globe-Democrat sent a letter to all its employees, saying in part:

> "To effect greater economy and efficiency in mechanical operation, The Globe-Democrat today entered into an agreement with the St. Louis Post-Dispatch under which the Globe-Democrat will be printed by the Post-Dispatch, when and if the Guild strike is settled.
>
> "The sale is of the physical property only. The editorial, advertising, circulation and business departments of the two newspapers will be entirely separate. The Globe-Democrat will continue as a completely independent newspaper in every sense of the word.
>
> "The consolidation of mechanical operations between competing newspapers finds great precedent in many cities throughout America, a list which we suspect may grow larger in the future as the mechanical costs of publishing a daily newspaper continue to rise. The editorial, advertising, circulation and business independence of these newspapers has not in any way been effected. I assure you that it will not be affected in St. Louis.
>
> . . .
>
> "Members of the mechanical unions will be employed on a priority basis in the consolidated mechan-

ical operation. If they all cannot be employed, the dismissal provisions of the current mechanical contracts will apply."

None of plaintiffs performed any work for, received any compensation from, or were called back to work by Globe-Democrat after February 27, 1959. All plaintiffs were on the last priority (seniority) list made up in February, 1959, which showed when each member of Union became an employee of Globe-Democrat. Union had another group of members (called a "chapel") in the composing room of the Post-Dispatch. None of plaintiffs' names appeared on the priority list at the Post-Dispatch chapel as of February 27, 1959. A member of Local 8 in the employment of the Globe-Democrat could not have priority with more than one newspaper at the same time, and if an employee lost priority standing at Globe-Democrat and took a job at some other newspaper his priority would begin as of the date of his employment by the second employer and his priority prior to February 27, 1959, was lost. Those plaintiffs hired by Post-Dispatch after February 27, 1959 were given situations in their priority at the bottom of the Post-Dispatch priority list. The president of Union testified that at a meeting on February 27, 1959 called by the publisher of Globe-Democrat, attended by representatives of the mechanical craft unions, the publisher announced the sale of Globe-Democrat's printing equipment to Pulitzer and that Globe-Democrat would no longer need the services of the members of the various mechanical union, and that Post-Dispatch would hire what they needed of the former Globe-Democrat employees "and those who were not employed by the Post-Dispatch would receive severance pay."

Certain alleged admissions by Globe-Democrat, by way of pleading in the several lawsuits involving the various mechanical craft unions, were read in evidence. By these pleadings Globe-Democrat admitted that it gave notice that there had been a *merger of mechanical operations* of the

two newspapers; that it gave notice that *the mechanical operations of the two companies were consolidated and merged* and operated solely and exclusively by and under control of Pulitzer; that there *had* been a *discontinuance of mechanical operations* by Globe-Democrat. In its answer in Irwin v. Globe-Democrat Publishing Company, No. 49,026 before this Court, Globe-Democrat construed the arrangement between Globe-Democrat and Pulitzer *as a merger or a consolidation of the mechanical functions of the two publishers.* Globe-Democrat also admitted in a pleading that the Globe-Democrat gave notice to plaintiffs and their union representatives of the *discharge of plaintiffs* and the *suspension of the printing* of the newspaper by Globe-Democrat. Since February 21, 1959 Globe-Democrat has not owned the building where, or the equipment on which, plaintiffs performed their accustomed work, and has no contractual right to use presses, printing equipment and auxiliary facilities with which Globe-Democrat newspapers could have been printed. As a consequence of the strike, Post-Dispatch had need for additional help in its mechanical department. Some of the plaintiffs were sent by Union to Post-Dispatch to do this additional work. Some were sent to other places of employment. At Post-Dispatch these former employees of Globe-Democrat did not immediately get "situations" under union law that if an employee occupies a position for five successive nights and days in an employment he is entitled to a situation, because Union "froze" the priority board at Post-Dispatch until after the end of the Guild strike at Glob Democrat (May 27, 1959). The freeze officially went off at approximately the time the Post-Dispatch started printing the Globe-Democrat, June 1, 1959. On June 2, 1959 Post-Dispatch made a statement of policy with reference to new employees formerly employed by Globe-Democrat, to the effect that they would be "new" employees of Pulitzer; that Pulitzer was under no obligation to employ any particular person or any number of persons formerly employed by Globe-Demo-

crat, but had agreed to select such new employees as it might need from qualified former employees of Globe-Democrat, if available, stressing that Pulitzer had no connection with Globe-Democrat except its agreement to print Globe-Democrat on a contract basis in Pulitzer's plant. The notice also stated that in the event a former employee of Globe-Democrat should become eligible to dismissal or severance pay after employment as a new employee of Post-Dispatch only actual service in employ of Post-Dispatch should be taken into consideration in computing the amount of such severance pay. Globe-Democrat continued to pay the employer's contribution for plaintiffs' Blue Cross-Shield coverages after February 27, 1959, and as long as June 1, 1959. The court refused an offer by Globe-Democrat to prove that among the persons engaged in the printing trade and printing business in the St. Louis area the word "printing" means the mechanical reproducing of type on paper, and the word "publication" means the making public of printed matters. Plaintiffs introduced no evidence that in the trade "publication" is understood as the equivalent of "printing," or that Globe-Democrat Publishing Company as a corporation had been involved in any merger or consolidation. It was established that there was no change in the corporate status of the Globe-Democrat Publishing Company, a corporation, since its incorporation in 1873, and that neither Globe-Democrat nor Pulitzer acquired any interest in the other's corporation. Post-Dispatch has been printing the Globe-Democrat under its agreement, since June 1, 1959, with the exception of 14 days in June 1959, when publication was interrupted by a strike at Post-Dispatch.

Plaintiffs' petition sought severance pay under Article XI, paragraph 2 of the collective bargaining agreement, supra, on the basis of allegations that the *mechanical operations of the two papers were consolidated* and operated exclusively by Post-Dispatch, and that there was a merger, consolidation or permanent suspension of the *printing* of

the Globe-Democrat by defendant, but plaintiffs' main instruction directed a verdict on the basis of a finding that there was a "*merger, consolidation or permanent suspension of publication by defendant* as set out in Article II, paragraph 2 of the aforesaid collective bargaining agreement," and that "plaintiffs, or any of them, lost employment thereby with defendant, * * *."

The court defined the term "lose employment thereby" occurring in Article XI, paragraph 2, as "loss of employment with any newspaper in the event of a merger, consolidation or permanent suspension of publication" and instructed the jury to disregard whether plaintiffs worked for other employers after loss of employment with Globe-Democrat.

The court refused defendant's motion for a directed verdict; and refused Instructions B and C, withdrawing consideration of whether there was a permanent suspension of publication and whether there was a merger or consolidation, and Instruction D defining "merger," "consolidation" and "publication," all offered by defendant.

On this appeal defendant makes 10 points, six of which relate to the phrase "merger, consolidation or permanent suspension of publication"; four of which involve the phrase "who lose employment thereby."

The first point is that the court erred in refusing defendant's motion for a directed verdict because there was no evidence to support the necessary finding of either a "merger, consolidation or permanent suspension of publication" within the meaning of paragraph 2, Article XI, supra.

Globe-Democrat's position is that "merger" and "consolidation" are words of art having a specific meaning in the law of corporate reorganization, and that they were so used here; that the words "merger, consolidation * * *," modified by the adverbial phrase "by any newspaper,"

refer to merger or consolidation of the corporate entity Globe-Democrat Publishing Company, and to the assimilation of two or more corporate entities into one; that under the collective bargaining agreement employees are entitled to severance pay if they lose employment by reason of a corporate merger or consolidation, but these terms were not intended to cover loss of employment due to merger or consolidation of a department or a composing room, or suspension of the printing function upon sale of its physical plant and printing equipment, by a corporation which continues in business.

Globe-Democrat cites § 351.450, V.A.M.S., under which the several corporations involved in a statutory merger or consolidation become a single corporation known as "the surviving corporation" in cases of merger, and "the new corporation" in cases of consolidation; the separate existence of all corporations in a plan of merger of consolidation ceases, except for the surviving or new corporation, which thereafter possesses all of the rights, etc. of the merging or consolidating corporations, and all property, debts, etc. of them are taken to be transferred to the single corporation, along with the liabilities and obligations of the corporations so merged or consolidated. Appellant says Globe-Democrat Publishing Company and Pulitzer Publishing Company each of which survived and preserved its own separate corporation existence and identity, did not merge or consolidate into a "surviving or new corporation."

Globe-Democrat contends that the words "merger" and consolidation express ideas which, although nearly the same, are distinct enough to require that both words be used when both types of corporate reorganization are intended to be encompassed; that if merely unification of function had been intended, either word would have expressed the whole of the idea and there would have been no need of both; that the use and juxtaposition of these two words, in the contract, echoing their use and juxta-

position in the statutes,[1] indicates that the parties had in mind the type of merger or consolidation to which the statutes refer.

Globe-Democrat further contends that even if the words are to be construed with an imprecise and general meeting, it is nevertheless plain that the parties did not intend that the clause operate in the event of any type of partial or functional unification. It points to the modifying phrase "by any newspaper covered by this contract," contending this refers to Globe-Democrat Publishing Company, a corporation, and that it is the publishers and the conduct of the business of the corporate publishers, not the publications, that we "covered by this contract."

Globe-Democrat also relies upon the dictionary definition of "consolidation" ("to bring together and unite firmly into one mass or body") and "merger" ("to sink or disappear into something else; be swallowed up; lose identity or individuality; with in.")

Globe-Democrat says the only fact or evidence pleaded, proved or submitted to the jury upon which to predicate the conclusion of merger or consolidation was the sale of the plant and equipment and the execution of the printing contract, neither of which indicates that Globe-Democrat was united with or swallowed up by Pulitzer, and that this is true whether the word "newspaper" be construed to mean the publisher *or* the publication. It maintains that the contract between the publishers carefully preserves the separate identity and mutual independence of the two corporations, and is a simple printing contract; that there is no evidence of any uniting or swallowing up by either of them or that the absolute separation preserved by the contract has not been scrupulously observed in fact; that no merger or consolidation was shown by the evidence.

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[1] In addition to § 341.450 we are referred to §§ 355.195, 352.140, 394.210 and 394.220, and § 363.770, et seq.

Union's position is that "merger" and "consolidation" was intended to include any sort of uniting or combining of the printing function as a result of which employees lose their employment. They refer to paragraph I of the Preamble to the collective bargaining agreement, which provides: "All wages, vacation credits, retirement pay credits and severance pay credits shall be considered as an earned equity and shall have prior claim in the event of merger, permanent suspension or liquidation. The cash equivalent of any such earned equity shall be paid immediately upon any employe's severance of employment as a result of such merger, permanent suspension or liquidation." and to Section 13, Article III, General Laws of the Union, which provides: "Subordinate unions shall incorporate in proposed contracts a clause providing for * * * severance pay of not less than two weeks' pay for each year of priority in the office for all journeymen affected by suspension or mergers * * *." The failure in these quotations to use the words "merger" and "consolidation" in juxtaposition; the use only of the word "merger" and the use of the words "permanent suspension" instead of "permanent suspension of publication" indicate that the parties intended the words "merger" and "consolidation" to mean any combining or uniting of the printing function which results in a loss of employment, so says the Union. Union proposes that the following language appearing in Section 23, Article I, General Laws of the Union, reveals that Article XI of the collective bargaining agreement is speaking of mergers or consolidations of *printing offices:* "In filling of apprenticeship vacancies preference shall be given to apprentice members discharged from the military services * * * whose terms of apprenticeship have been interrupted because of suspensions, mergers or consolidations of printing offices, * * *."

Union argues that the words in question are common, ordinary words in every day use, and do not have the definite legal meaning for which appellant contends; that

while they might at first have such a connotation to one trained in the law, they do not convey such a meaning to the ordinary composing room employee or a member of a union negotiating committee, to whom these words mean a unification or combining of the function of printing.

Union maintains that the parties did not mean "merger" or "consolidation" in the sense of a corporate merger or corporate consolidation; that there is no evidence to support such a construction but there is evidence that the publisher of Globe-Democrat considered that what happened constituted a merger, consolidation or permanent suspension of publication within the meaning of the contract, as shown by his oral statement and letter of February 27, 1959 indicating that those mechanical employees who did not obtain employment with Pulitzer would receive severance pay, and his references to "consolidation of mechanical operations." Reference is made to allegations in various pleadings filed by Globe-Democrat in the five lawsuits filed in connection with the claims of the several unions, in which Globe-Democrat admitted that "the mechanical operations" of the two newspapers "were consolidated and merged" under the operation and control of Post-Dispatch, and that Globe-Democrat "and the merger, consolidation or permanent suspension of the printing" of the Globe-Democrat; admitted that Globe-Democrat gave notice to plaintiffs of a sale to Pulitzer of the building, printing presses, equipment, and physical properties of Globe-Democrat "so that the mechanical operations of the [Globe-Democrat] and [Pulitzer], could and would be consolidated and operated solely and exclusively by and under the control of [Pulitzer]"; admitted that Globe-Democrat discontinued mechanical operations; and alleged that "the arrangement between defendant and [Pulitzer] was within the meaning of Article XII, Section 1 (the same as instant Article XI, Paragraph 2) a merger or consolidation of the mechanical functions of the two publishers, * * *."

Union also urges that the court should have ruled as a matter of law that there was a merger, consolidation or permanent suspension of employment, and a loss of employment thereby. It says this was an agreement to provide severance payments to employees of Globe-Democrat "in the event that such employees lost their employment through no fault or misconduct on their part"; that it covered the performance of composing room work; that if composing room operations were terminated employment would be terminated and it was for such a loss of employment that Article XI was intended to provide severance pay; that it would be of no concern whether appellant was able to put out a newspaper by some other means or in some plant other than its own; that it is "inconceivable" that the parties would make payment of severance benefits depend upon Globe-Democrat's ability to continue publishing by whatever means it could, regardless of whether plaintiffs were still employed to perform composing room work.

In determining whether plaintiffs adduced evidence of merger, consolidation or permanent suspension of publication within the meaning of the agreement, and in construing the agreement to determine what the parties intended by the provision in question, we look at the relationship of the parties, the subject matter of the contract as a whole, the surrounding facts and circumstances to the extent that they are shown and bear upon the matter, and any practical construction the parties themselves may have placed upon the agreement by their acts and conduct. Leggett v. Missouri State Life Ins. Co., Mo. Sup., 342 S.W.2d 833, 852.

Thus considered, we conclude that the loss of employment referred to in paragraph 2, Article XI was loss of employment resulting from Globe-Democrat Publishing Company, a corporation, GOING OUT OF BUSINESS AS THE PUBLISHER OF A NEWSPAPER, either by corporate merger or consolidation, or by permanently suspending publication for any reason.

This seems evident not only from the specific language used in said paragraph 2, but also by considering the wording "merger, permanent suspension or *liquidation*" (our emphasis of language indicative of the winding up of a corporation) (occuring in paragraph (1)) of the Preamble.

By differentiating between the two concepts "merger" and "consolidation" the parties evidently meant to ascribe to the two words different meanings. In Dodier Realty & Inv. Co. v. St. Louis Nat. Baseball Club, 361 Mo. 981, 238 S.W.2d 324, this Court, sitting en banc, pointed out that the two words are not the same; that a consolidation exists where a new corporation comes into existence to assume the liabilities of the former corporations and the former corporations are dissolved and cease to exist, while a merger, which means something more than a mere consolidation, exists where one corporation is continued and the others are merged in it without the formation of a new corporation. And see § 351.450, V.A.M.S. The words were used in connection with "any newspaper covered by this contract," which means in this instance Globe-Democrat Publishing Company, a corporation. When words with a well-defined meaning are used in a contract referring to a corporation it is reasonable to assume that they are used by the contracting parties in the sense ordinarily ascribed to them in the field of corporate law.

Stated in the language of corporate reorganization, there has been no merger or consolidation resulting in the formation of a surviving or new corporation and no dissolution of Globe-Democrat Publishing Company, a corporation. The stockholders of Globe-Democrat did not become stockholders of Pulitzer, or vice versa. The corporations have not been extinguished and have not been consolidated. The contract was for an absolute sale and transfer of the properties to Pulitzer, and for printing. Globe-Democrat did not become extinct, either as a corporation or as a publication. It retained its franchise and continued to function.

as a corporation. Its corporate identity has continued without interruption since 1873.

The mere purchase by one corporation of a part of the assets of another for a sufficient consideration (and there is no suggestion that the consideration was inadequate or that the sale was not in good faith) is not a merger or a consolidation. Mercantile Home Bank & Trust Co. v. United States, 8 Cir., 96 F.2d 655; Pinellas Ice & Cold Storage Co. v. Commissioner of Internal Revenue, 287 U.S. 462, 53 S.Ct. 257, 77 L.Ed. 428; Drovers' & Mechanics' Nat. Bank v. First Nat. Bank, 4 Cir., 260 F. 9; Pankey v. Hot Springs Nat. Bank, 46 N.M. 10, 119 P. 636, 640.

Whether we define these terms by resort to legal sources, everyday dictionaries or common understanding, the words "merger" or "consolidation" by Globe-Democrat describes situations not presented by the facts in this case. There simply has been no combining, uniting, swallowing up, absorption, springing into existence of a new corporation or dissolution of an existing corporation, involving Globe-Democrat Publishing Company, by which its identity as a newspaper and as a corporation has been extinguished.

Union's proposition that the language employed was intended to encompass "any sort of uniting or combining of the printing function" finds no support in the wording of paragraph 2, in any other provision of the agreement, or in the evidence. The agreement makes no reference whatever to the uniting or combining of the printing function, the composing room, the chapel, the Machine Department, the Machine Tenders' Department, the Proofroom Department, the Adroom Department, the Makeup Department, or any other unit or fragmentation of "the newspaper covered by this contract." Instead the contract refers to "merger" or "consolidation" *by any newspaper covered by this contract*, which in this case means "by Globe-Democrat Publishing Company, a corporation."

Plaintiffs also failed to prove that there was a "permanent suspension of publication." This phrase cannot be twisted and strained to mean permanent suspension of "printing," under any fair interpretation of the word "publication," whether we use technical legal definitions or everyday acceptance of the words. "Publication" is not synonymous with "printing" in this situation. In the context in which it is employed, "publication" means the business of causing a newspaper to be composed, edited, printed and disseminated or distributed to the public, and the fact that the Globe-Democrat terminated the practice of causing its newspaper to be printed by its own employees in its own building or plant did not result in a "permanent suspension of publication." Allen v. Globe-Democrat Publishing Company, Mo. Sup., No. 49,089. The facts show a temporary suspension of publication, caused by the strike, but no permanent suspension of publication. The Globe-Democrat resumed publication June 1, 1959.

We find no practical construction, either in the pleadings filed or in its letter or oral announcement on February 27, that constitutes a binding admission against interest by Globe-Democrat that there was a merger, consolidation or permanent suspension of publication by Globe-Democrat. The most that can be said is that Globe-Democrat construed the contract of sale and for printing as a *merger or consolidation of the mechanical operations* of the two newspapers. A consolidation of one particular function such as mechanical operations, out of the manifold operations involved in the conduct of a newspaper business, is not a consolidation of the business, or of the corporation. An admission that the mechanical operations of two newspapers have been consolidated by a sale and printing contract is not an admission that there has been a consolidation of the two corporate entities.

Union's references to various provisions of the General Laws of the International Typographical Union in support

of their construction have little if any bearing upon the question, because the General Laws were not incorporated in or made a part of the terms of the collective bargaining agreement, except as provided in Articles II, 5 and VI, 1, both of which are immaterial here. Inconsistently, counsel for Union took the position below that the General Laws were not a part of the contract and were not binding upon Globe-Democrat.

We realize that this collective bargaining agreement was a comprehensive labor contract the object and purpose of which, from the standpoint of the bargaining representatives of Union, was to protect the interests of the members of Local 8 in every conceivable aspect of their employment, including severance pay, as fully as possible. Doubtless their objective was to provide for all contemplated circumstances in which the question of the right to severance pay might arise. The language finally agreed upon to accomplish this objective, however, was not sufficiently comprehensive to cover all situations and circumstances in which the employer-employee relationship between the members of Local 8 and Globe-Democrat might be terminated. Instead of providing for severance pay upon termination of the relationship for any reason not connected with wilful breach of duty or willful misconduct (as was done in the Guild contract in Globe-Democrat Publishing Co. v. Industrial Commission, Mo. App., 301 S.W.2d 846, 848), 40 LRRM 141, the agreement before us provides severance benefits in *three particular eventualities only*, thereby excluding all others. The parties simply failed to provide for, and the agreement does not contemplate, the situation that actually came to pass, i.e., loss of employment with Globe-Democrat resulting from the sale of the physical plant and equipment by which Globe-Democrat had been printing its newspaper, and the negotiation of a contract with an outside firm for the physical printing of the newspaper.

Plaintiffs' rights under this agreement depend entirely upon contractual provisions. We are not at liberty to write into the contract a provision covering loss of employment by consolidation of *Mechanical operations* or permanent suspension of *printing*. We cannot decide the case on the basis of what the parties may have intended to say. Our function is to determine what the parties intended by *what they did say*. Chater v. Carter, 238 U.S. 572, 584, 35 S.Ct. 859, 863.

There is no evidence in this record that there was any merger, consolidation or permanent suspension of publication, within the meaning of paragraph 2, Article XI, and appellant's motion for a directed verdict at the close of the evidence, based upon failure of proof, should have been sustained.

The judgment is reversed.

Coil, C., and Hohman, C., concur.

PER CURIAM: The foregoing opinion by Houser, C., is adopted as the opinion of the court. All of the Judges concur.

[On Rehearing, June 4, 1963]

PER CURIAM:—Respondents have filed a motion for rehearing or to transfer to the court en banc. Transfer is requested on the contention that this case involves a federal question requiring the transfer of the case to the court en banc under Constitution of Missouri, 1945, Art. 5, § 9, namely, individual employees' rights arising under a collective bargaining agreement with an employer engaged in activities affecting interstate commerce within the meaning of and subject to the Labor Management Relations Act 1947, as amended, and that the case arises under and is

governed by Section 301(a), LMRA, 29 U.S.C. Section 185(a).

No question involving the construction of the constitution of this state or of the United States, or the validity of a treaty or federal statute, or any authority exercised under federal laws,[1] was raised or involved in the original submission of this case, either in the trial court or in this court, until after the opinion of this court was handed down. The attempt to inject a federal question for the first time in the motion for rehearing came too late to secure a transfer to the court en banc, under our practice and procedure.

Respondents further contend that in construing this collective bargaining agreement local state law instead of applicable federal substantive law was improperly applied; that the principles and precepts of federal labor law and policy must be observed; that the context in which this agreement was negotiated and the purpose it was intended to serve should have been considered; that collective bargaining agreements are federal contracts which are conceptually different from other contracts and subject to different approaches in their construction and enforcement. It is urged that the interests and position of respondents were not considered; that the obvious intendment and purpose of Article XI was overlooked; that federal labor law and policy require a construction favorable to the demands of respondents; that the courts should interpolate terms which might have been but were not included in the agreement, so as to effectuate the policies

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[1] These are the standards by which we determine whether there is a "federal question" requiring transfer. McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 324 Mo. 1005, 25 S.W. 2d 791; Huckleberry v. Missouri Pac. R. Co., 324 Mo. 1025, 26 S.W. 2d 980, 988; Pashea v. Terminal R. Ass'n of St. Louis, 350 Mo. 132, 165 S.W. 2d 691, 696; State ex rel. Perrine v. Keirnan, 361 Mo. 871, 237 S.W. 2d 156.

of federal labor law and accomplish the "evident aims and purpose" of the agreement, where necessary; that respondents' interpretation of the agreement is "in accord with substantive federal law," and that we should rule in respondents' favor because our construction of the agreement can only breed discontent and inharmonious relations between employers and employees, constitute a source of unnecessary and disrupting litigation, and have an unsettling effect upon the negotiation and administration of collective bargaining agreements throughout the country.

The suggestion that federal labor policy and federal substantive law governs the construction of this agreement is a new theory, introduced into this litigation for the first time on the motion for rehearing. As indicated, the case was not submitted on any such theory, either in the trial court or in this court. No reference was made in respondents' brief on appeal to federal law, in urging us to adopt their interpretation of Article XI. Both sides treated all questions for decision as questions arising under local law and determinable by local law. New propositions and complaints, not made in the original briefs, Ford v. Wabash Ry. Co., 318 Mo. 723, 300 S.W. 769, 778, and raised for the first time after the opinion is handed down by the Supreme Court, Phippin v. Missouri Pac. R. Co., 196 Mo. 321, 93 S.W. 410, 418, or which are clearly afterthoughts, State ex rel. Cole v. Matthews, en banc, Mo. Sup. 274 S.W.2d 286, 292, ordinarily will not be considered on motion for rehearing. We will consider the matter, however, sufficiently to point out the following: Although on original submission respondents cited no federal cases, but only Missouri cases and cases from other states, and on this motion for rehearing have not cited any federal cases construing a provision similar to Article XI, our original research, and our research on this motion for rehearing, was conducted in the case law of both hierarchies, state and federal. We have found no federal cases construing such a provision or a similar provision and we are of the opinion

that there are no ruling cases in the federal courts applying any different rule or reaching any different result on comparable facts. Respondents have not shown that our decision is contrary to any federal decisions on this subject. We consider our decision not inconsistent with the existing body of federal law. The parties were accorded a review of the provisions of the contract under applicable law on the merits in accordance with accepted principles of construction and on the basis of what the parties said in their agreement. Neither respondents, nor appellant, were entitled to prevail on the basis of what they intended to say or might have said, or on the basis of the effect a certain construction may have upon industrial peace, nor on any basis except the merits of their contentions.

Nothing said in Smith v. Evening News Association, 371 U.S. 195; 83 S.Ct. 267, 9 L.Ed.2d 246; or in any of the other United States Supreme Court decisions cited in respondents' suggestions, militates against the conclusions we have reached. In none of these cases was there a question of construction analogous or similar to that presented in this case. Assuming that we are obliged to follow and apply federal substantive labor law and policy, the United States Supreme Court has not issued any universal ukase that in all cases of disagreement between the parties to collective bargaining agreements federal labor law and policy dictates that the position of the labor union shall be sustained arbitrarily or that the preservation of harmonious labor relations requires the capitulation of employers in all cases where questions of interpretation arise, regardless of the merits of the case, but this is what respondents seem to imply.

Having decided this case on its merits we do not conceive it to be our function to sustain respondents' position in this case willy-nilly, "lest it be summarily returned to this Court by the Supreme Court of the United States," as respondents' counsel warn on page 12 of their suggestions.

Respondents' contentions that we misinterpreted the law in holding that the General Laws were not incorporated into the agreement; in applying improper principles of review; in holding that the motion for a directed verdict should have been sustained; in ruling that permanent suspension of publication cannot be interpreted to mean permanent suspension of printing; in holding that Article XI means corporate merger or consolidation by appellant; in holding that permanent suspension of publication meant to go out of business as a publisher of a newspaper; in invading the province of the jury by construing the language of Article XI; and in failing to consider controlling decisions of local law with which this opinion is said to conflict, constitute mere reargument of issues determined by the opinion. Under Sup. Ct. Rule 83.16 reargument of such issues will be disregarded. We have carefully examined these contentions seriatim and have satisfied ourselves that no matters of law or fact have been overlooked or misinterpreted. The motion for a rehearing or to transfer is overruled.

APPENDIX C

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER TWO

No. 49,089

WALKER H. ALLEN, et al., *Respondents*,

v.

GLOBE-DEMOCRAT PUBLISHING CO., *Appellant*.

STOCKARD, Commissioner:—This appeal is taken from the judgment of the Circuit Court of the City of St. Louis wherein eighteen plaintiffs were awarded "dismissal pay" in various amounts totaling $27,180.60 alleged to be due pursuant to the terms of a collective bargaining agreement between the St. Louis Stereotypers' Union No. 8 of the International Stereotypers' and Electrotypers' Union, AFL-CIO (hereafter referred to as "Local No. 8"), of which all plaintiffs are members, and the St. Louis Newspaper Publishers' Association, of which the "Globe Democrat" was a member.

On February 21, 1959 certain employees of the Globe-Democrat who were members of the St. Louis Newspaper Guild, a labor union not directly affiliated with Local No. 8, went on strike and established a picket line at the Globe-Democrat's place of operations. All the plaintiffs voluntarily refused, or at least failed, to cross the Guild picket line and report for work, except Albert W. Ebeling who entered the Globe-Democrat building on the first day of the strike, stayed for a little less than an hour and then departed and did not again return. On February 21, 1959 the publisher of the Globe-Democrat sent a letter to each plaintiff in which he stated, among other things, "I regret very much that the Globe-Democrat will not be able to publish its Sunday edition because of a strike by the St. Louis Newspaper Guild. It does not appear probable that publication will be resumed in the immediate future." On the following day the president of Local No. 8 received a

telegram from the Globe-Democrat in which it was stated that no "lockout" of the members of Local No. 8 existed, and that "Any Globe-Democrat employee member of your union who has presented himself today or continues to report for work at his accustomed place of work on his regular work days and hours will be put to work and paid his regular day's pay at the straight-time rate until the work stoppage caused by the Newspaper Guild is ended or until further notice." The president read this telegram to the members of Local No. 8 at a meeting but none of the plaintiffs reported for work.

On February 27, 1959, while the Guild strike was still in progress, the Globe-Democrat sold to the Pulitzer Publishing Company (hereafter referred to as the "Post-Dispatch") which published the St. Louis Post-Dispatch newspaper, its principal physical properties and entered into a contract with the Post-Dispatch whereby it would print the Globe-Democrat newspaper "from the date when Globe-Democrat Publishing Company is prepared to resume publication following the settlement of the present strike of its employees." The sale resulted in a transfer to the Post-Dispatch of all of the equipment used by the plaintiffs in their previous employment with the Globe-Democrat as stereotypers. A notice by letter of this sale was furnished to each plaintiff and to the representative of Local No. 8 which stated, in part, as follows:

> "To effect greater economy and efficiency in mechanical operation. The Globe-Democrat today entered into an agreement with the St. Louis Post-Dispatch under which The Globe-Democrat will be printed by the Post-Dispatch, when and if the Guild strike is settled.
>
> "The sale is of the physical property only. The editorial, advertising, circulation and business departments of the two newspapers will be entirely separate. The Globe-Democrat will continue as a completely independent newspaper in every sense of the word.

"The consolidation of mechanical operations between competing newspapers finds great precedent in many cities throughout America, a list which we suspect may grow larger in the future as the mechanical costs of publishing a daily newspaper continues to rise. The editorial, advertising, circulation and business independence of these newspapers has not in any way been affected. I assure you that it will not be affected in St. Louis.

* * * * *

"Members of the mechanical unions will be employed on a priority basis in the consolidated mechanical operation. If they all cannot be employed, the dismissal provisions of the current mechanical contracts will apply.

* * * * *

"I can assure you that The Globe-Democrat will continue in the future, as it has in the past, as an independent newspaper and as a mighty force for good in St. Louis, in Missouri and in America."

On May 27, 1959, the Guild strike terminated, and throughout the entire period of the strike the Globe-Democrat maintained the status of plaintiffs as employees, insofar as its contributions were called for under the Blue Cross-Blue Shield program and group life insurance program. None of the plaintiffs, with the one minor exception previously noted, worked for the Globe-Democrat during the Guild strike or after its termination. Most of the plaintiffs took employment as stereotypers with the Post-Dispatch.

The provision in the collective bargaining agreement under which plaintiffs seek to recover "dismissal pay" is as follows:

"Article VII

"Dismissal Pay

"Section 1. Any employe who has had a regular situation for more than one year who is laid off to reduce the force shall receive dismissal pay on the basis of one week's pay for each year of continuous employment.

"Section 2. In the event of merger, consolidation or permanent suspension of publication by any newspaper covered by this agreement all employes who lose employment thereby shall receive dismissal pay as follows:

"Employees who have held regular situations for more than six months but less than one year shall be paid six weeks' dismissal pay.

"Employees who have held regular situations for more than one year shall be paid twelve weeks' dismissal pay.

"Section 3. Dismissal pay shall be at the employe's regular straight time rate of pay as of the time of dismissal."

The collective bargaining agreement does not provide for "dismissal pay" to an employee in any and all situations wherein the employment status is terminated, other than those specifically excepted, as do some and probably most labor agreements. See Globe-Democrat Publishing Company v. The Industrial Commission, Mo. App., 301 S.W. 2d 846, 40 LRRM 141; Talberth v. Guy Gannett Publishing Company, 149 Me. 286, 100 A. 2d 726, 40 A.L.R. 2d 1036, 33 LRRM 2266; Matthews v. Minnesota Tribune Co., 215 Minn. 369, 10 N.W. 2d 230, 147 A.L.R. 147; and the cases collected in the annotation at 40 A.L.R. 2d 1044. Instead, the agreement provides for "dismissal pay" in only certain specifically defined and delimited situations, and in doing this the Globe-Democrat is relieved from the duty or obligation to make such payment in all other situations.

Plaintiffs base their claim on the provision in Section 2 of Article VII of the agreement which obligates the Globe-Democrat to make payment of "dismissal pay" to "all employes who lose employment" in the event of the "permanent suspension of publication by any newspaper covered by this agreement." While they alleged in their petition that the Globe-Democrat notified them of their dismissal "and the permanent suspension of the *printing* of its own newspaper," their main instruction directed a verdict on the basis of a finding that there was "a permanent suspension of *publication* * * * as the term * * * appears and was used in the said collective bargaining contract." Our ultimate ruling makes it unnecessary to rule on certain questions presented by the Globe-Democrat concerning the submission of such an issue to the jury in that manner.

On this appeal the Globe-Democrat contends that the facts proved by plaintiffs do not authorize a finding of "a permanent suspension of publication." Plaintiffs contend, on the other hand, that (1) the allegation of a "permanent suspension of printing" is the ultimate fact from which the court and jury could find that a "permanent suspension of publication" occurred; (2) the use of the term "suspension of publication" in the collective bargaining agreement which provided "for the performance of certain mechanical operations relating solely to printing has reference to, and in the context used is intended to mean and require as a necessary element, the physical act of cessation of the printing and other mechanical operations;" and (3) the term "publication" and its derivatives is in its various contexts synonymous with the term "printing" and its derivatives. Plaintiffs also argue that the Globe-Democrat "would have the court believe that the plaintiffs were expert lexicographers well aware of the fine etymological distinctions" between the words "printing" and "publish." This latter argument apparently is directed to the issue as to what the *parties* to the collective bargaining

agreement intended when the terms thereof were negotiated and agreed to. While plaintiffs as third party beneficiaries are entitled to enforce the terms of the collective bargaining agreement inserted therein for their benefit, Baron v. Kurn, 349 Mo. 1202, 164 S.W. 2d 310, 142 A.L.R. 787; 31 Am. Jur. Labor § 128, they are not parties to the agreement. They must rely on the terms of the agreement as agreed to by the parties thereto, and the agreement is subject to the same rules of interpretation as other contracts. 56 C.J.S. Master and Servant § 28 (41)a.

Our first impression was that the term "permanent suspension of publication" was plain, clear and unambiguous, that no construction was called for, and that this unequivocal language should be given its plain meaning and enforced as written. See Community Federal Savings and Loan Association of Overland v. General Casualty Company of America, 274 F. 2d 620, which sets forth the rule adhered to by the courts of Missouri. However, when considered in all the circumstances, and in view of the language of some court decisions, we conclude that it may reasonably be said that the phrase is fairly susceptible to different constructions, and we shall look to the circumstances, the purposes of the provision, and the context in which used in order to ascertain the intent of the parties. Wilson v. Owen, Mo., 261 S.W. 2d 19, 23; 56 C.J.S. Master and Servant § 28 (41)a. In support of their contention that the term "publish," and its derivatives, is synonymous with the term "printing," and its derivatives, plaintiffs quote from Webster's International Dictionary, 2nd ed. the definition of the word "publish" as follows: "To bring before the public, as for sale or distribution: esp.: a. To print, or cause to be printed, and to issue from the press, either for sale or general distribution, as a book, newspaper, piece of music, engraving, etc." They also quote from the same source the definition of the word "publication" as follows: "The issuing to the public of copies, now usually printed or similarly produced copies, of a book, en-

graving, or the like; hence, the business of printing, etc. such copies; * * *." However, the expression "etc." refers back to the previously stated activities, and the last phrase, when completed to give the full intended definition, "the business of printing [and issuing to the public] such copies [that is, copies of a book, engraving, or the like]." These dictionary definitions are of limited help. We do not consider that they establish that the two terms are synonymous, but they do indicate that in some circumstances depending on their use they may have somewhat similar meanings.

Very few cases have been found which construe the words "publication" or "printing" in relation to newspapers. It may be said, with certain isolated exceptions subsequently noted, that the reported cases are generally to the effect that although the "words 'print' and 'publish' are often confused," the "word 'publish' cannot be construed to mean print,'" Wolfe County Liquor Dispensary Ass'n. v. Ingram, 272 Ky. 38, 113 S.W. 2d 839; there "is a distinction between printing a newspaper and publishing a newspaper" and a person "is not required to print a paper in order to publish same, but can have the printing done elsewhere," Cox v. First Mortgage Loan Co., 173 Okla. 392, 48 P. 2d 1060; a newspaper "might be printed but never published" and it is "published when put in general circulation," Lewis v. Tate, 210 Ark. 394, 197 S.W. 2d 23; Wolfe County Liquor Dispensary Ass'n. v. Ingram, supra; a newspaper is published at that place where it is first put in circulation "and not at the place where it is printed," Bardwell v. Town of Clinton, La. App., 180 So. 148; Vick v. Bishop, 252 Ala. 250, 40 So. 2d 845; Madigan v. City of Onalaska, 256 Wis. 398, 41 N.W. 2d 206; Addison v. Town of Amite City, La. App., 161 So. 364; State v. Briewa, 198 La. 970, 5 So. 2d 304; in determining the place of "publication" it is immaterial where the printing is done, Loos v. City of New York, 9 N.Y.S. 2d 760, 774; and "it would strain every rule of construction beyond all reasonable

limits to read the words 'printed' and 'publication,' which have well defined meanings, as being synonymous. Printing implies the mechanical art by which type is imprinted upon the paper, whereas, publishing means the conveying of knowledge of notices." Haban v. Suburban Home Mortgage Co., Ohio App., 57 N.E. 2d 97, 100.

Turning to what we consider to be the limited exceptions, we find that this court in a nonadversary proceeding held that the statutory requirement that the supreme court docket "be printed in the county" where court is to be held required the docket to be published in a newspaper in Cole County. This result was reached after a review of an unusual history of the statutory requirement, and because, according to the court, the Legislature "unfortunately used the word 'printed' instead of the word 'published,' but meaning all the time a publication of our docket in a local newspaper." See In re Publishing Docket in Local Newspaper, 266 Mo. 48, 187 S.W. 1176, in which the opposite result was reached by a divided court with a dissent by Judge Graves, and In re Publication of Docket of Supreme Court, 266 Mo. 48, 232 S.W. 454, where the majority of a divided court adopted the reasoning in the dissent filed in the earlier case. In Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co., 52 Neb. 410, 72 N.W. 357, the statute required that a notice of foreclosure be "by advertisement in some newspaper printed in the county." The affidavit, which stated that the newspaper was "published" in the county was held sufficient because the object of the requirement of the statute was to give notice, and if the Legislature had in mind the distinction between "print" and "publish" it would not have selected the place of printing instead that of publication to serve that purpose. State ex rel. Vickers v. Board of Com'rs. of Big Horn County, 77 Mont. 316, 250 Pac. 606, pertained to the authority of a county to contract for public printing with a newspaper published in the county which was actually printed elsewhere when the

statute authorized a contract "with some newspaper, published at least once a week, and of general circulation, published within the county." It was held that while the statute used the word "published" the meaning depended upon the subject with which it was connected; that to publish a newspaper is "to compose, print, issue, and distribute it to the public;" that the purpose of the statute "was to compel the letting of printing contracts to local newspapers, in order that local capital and local labor should secure the benefits of the expenditures of money derived from local taxes;" and therefore the word "published" as used in the statute "evidently" meant "printed and published."

We conclude that the term "publication of a newspaper" when used in its ordinarily understood meaning and particularly when used by those familiar with the terminology used in the newspaper industry, refers to the business of causing a newspaper to be composed, edited, printed, and disseminated or distributed to the public. In order to "publish" a newspaper it is not essential that the "publisher" actually perform, as distinguished from contracting to have it done, each and every one of the above named operations. For example, we know that newspapers frequently reprint and publish articles previously written or composed which were obtained from other newspapers or news services, and the act of distributing the newspaper is frequently done by contract, particularly in large cities. There is no question but that the Globe-Democrat was "published" prior to the Guild strike. Yet, the "comic magazines" and the "Rotogravure" sections were printed at Buffalo, New York, and Louisville, Kentucky, respectively. After the Globe-Democrat entered into a contract with the Post-Dispatch the "Sunday supplement Green Sheet" was printed by the World Color Press in St. Louis, and certain portions of the Post-Dispatch were also printed by the World Color Press. To demonstrate that it is not an uncommon practice for a publisher to contract for the

printing of its publication, the Army Times Publishing Company, which publishes, as that term is generally known, the "Army Times" and the "Navy Times" has those publications printed by the World Color Press in St. Louis. Other examples could be cited. Therefore, the fact that the Globe-Democrat terminated the practice of causing its newspaper to be printed by its own employees in its own building or plant did not result in a "permanent suspension of publication" as that term is generally known and understood.

While we do not consider it particularly persuasive, and certainly not controlling, the fact that the above distinction between publishing a newspaper and printing it was the general understanding on the part of those plaintiffs who testified is clearly evidenced by their testimony, and also by Mr. Leroy J. Selby, the president of Local No. 8 during the Guild strike, who testified that after that strike the Globe-Democrat resumed *publication* and the Post-Dispatch started to *print* the Globe-Democrat newspaper. It is true that Mr. William K. Luttrell, president of Local No. 8 at the time of trial, testified that "There is no difference as far as I'm concerned" between "publication" and "printing," that it was his understanding that "publication" means "The printing of a newspaper," and that after the Guild strike he "would ascertain that [the Globe-Democrat] was circulated" and not published. However, he first testified that the basis for his opinion was the "Missouri Supreme Court Ruling" about which plaintiffs' attorney had told him on the previous day, and he then stated that aside from that ruling he based his opinion on "The fact that we [apparently meaning members of Local No. 8] are not there to print it, I don't know where the publication is coming from," and that he had had that opinion for "over two years." In this connection it also is interesting to note that in their petition plaintiffs allege that on February 27, 1959 the Globe-Democrat notified them of "the permanent suspension of the *printing* of its newspaper, but in the first

paragraph of the petition they allege that at the time of the filing of the petition, April 15, 1959, which was before the Guild strike ended, the Globe-Democrat "*is* and was at all times *hereinafter* mentioned doing business * * * *publishing* a daily newspaper * * *."

As previously noted, in at least three court cases it has been stated that by reason of the particular attending circumstances "publish" and "print" may be construed to mean the same. The question is thus presented whether in this case we should consider that by use of the term "publication" the parties to the agreement really meant "printing" notwithstanding that as generally known and understood the terms have different meanings. We are convinced that we cannot. The collective bargaining agreement was the "result of negotiations between the parties," and while the identity of the representatives of the parties in the negotiations are not shown, the procedure was for a negotiating committee on behalf of Local No. 8 to meet with representatives of the two newspaper publishing companies comprising the St. Louis Newspaper Publishing Association. These persons unquestionably were familiar with the newspaper business and the terms ordinarily and regularly used in the industry. Article V of the agreement is entitled "Vacations," and it is therein provided, among other things, that "If an employe is discharged for cause, or in any other manner severs his connection with the office prior to taking an earned vacation, such vacation pay, including pro rata credits earned within that same year, shall be due and payable to him within one week from the date of such action." Mr. Selby testified that the term "the office" as here used meant the employee's particular employer. He also agreed that by this provision an employee would be entitled to "vacation pay" whether he quit his employment, was "fired;" was laid off to reduce the force, or because he lost his job by reason of a "permanent suspension of publication." It is thus clear that when the parties desired to provide that "vacation pay" be given to an em-

ployee in the event of his termination of employment for any reason, the parties so expressed that intent in clear and unequivocal language. Plaintiffs argue, however, that they were employed to perform mechanical operations, and that pursuant to the collective bargaining agreement they could only do or be required to do work which "pertains to stereotyping," and it is "perfectly understandable, therefore, for stereotypers to testify that so far as they were *personally* concerned, they saw no difference between printing and publication." But, is this what those who negotiated the agreement meant by the words used? Our objective in construing the terms of the agreement is not to determine what the parties intended to say, but what they intended by what they did say. Chater v. Carter 238 U.S. 572, 35 S.Ct. 859, 863, 59 L.Ed. 1462. See also Paisley v. Lucas, 346 Mo. 827, 143 S.W. 2d 262. In the absence of some reason to require a different rule and none here exists, "The test of the meaning, of words commonly used, should be their ordinary and popular meaning; and they should not be construed in the broadest sense possible to include meanings to which they would not be applied by most people." Cleaver v. Central States Life Ins. Co., 346 Mo. 548, 142 S.W. 2d 474, 129 A.L.R. 1094. For all we know, the negotiating committee for Local No. 8 may have insisted on a provision authorizing the payment of "dismissal pay" in the event of a termination of employment for any reason not the fault of the employee, which apparently is the usual provision or at least not an infrequent provision when severance pay is provided for in a collective bargaining agreement. On the other hand, the negotiators on behalf of the St. Louis Publishers' Association may have insisted that there be no provision whatever in the agreement pertaining to "dismissal pay," but as a compromise, with a full understanding by all the negotiators of the distinction between "publication of a newspaper" and the necessary mechanical arts involved in the "printing of a newspaper" it was agreed by reason of

each side surrendering a portion of its demands, that the agreement should contain the precise wording used. In interpreting a collective bargaining agreement we must construe them as written, not as we may think they should have been written, and certainly not by interpolating words in them which are not there.

We find nothing in the circumstances pertaining to the use of the phrase "permanent suspension of publication" to justify a conclusion that those who drafted and negotiated the terms of the agreement did not intend to use the term as generally known and understood in the newspaper industry, and such evidence as there is on the matter compels the conclusion that the term was so used and intended. When we examine the language in the collective bargaining agreement and construe it according to the applicable rules, we must and do conclude that there is no evidence that plaintiffs lost employment because of a "permanent suspension of publication" on the part of the Globe-Democrat, and for that reason the judgment is reversed.

Bohling, C., Concurs. Barrett, C., Concurs.

PER CURIAM: The foregoing opinion by Stockard, C. is adopted as the opinion of the Court.

All of the Judges Concur.

[On Rehearing. June 4, 1963]

PER CURIAM:—Plaintiffs present a motion for rehearing containing thirty assignments of error. In their suggestions in support thereof they discuss only the contention pertaining to the alleged "failure by the Court to apply federal substantive law in reaching its decision," and those are the only assignments which merit additional comment.

Plaintiffs contend that pursuant to Section 301(a) of the Labor Management Relations Act of 1947, 29 USCA,

Section 185(a), and the decisions of the United States Supreme Court this court was required to apply federal substantive labor law in reaching its decision. We have re-examined plaintiffs' brief and find that no federal statute was cited therein, not even Section 301(a), supra, and no federal cases whatever were cited. In the submission of this case they relied solely on state court cases, primarily those from Missouri. It has long been the rule that new propositions and complaints not submited in the original briefs, Ford v. Wabash Ry. Co., 318 Mo. 723, 300 S.W. 769, 778, and raised for the first time after the opinion is handed down, Phippin v. Missouri Pacific Ry. Co., 196 Mo. 321, 93 S.W. 410, 418, or which are clearly afterthoughts, State ex rel. Cole v. Matthews, Mo. 274 S.W. 2d 286, 292, will not be considered on motion for rehearing. We do not propose now to change or relax that rule. However, if in a suit in a state court by an employee against an employer on a collective bargaining agreement, we are required to apply "federal substantive law" and we did not do so, and the result reached is contrary to such law, then plain error would have resulted. We may, in our discretion, consider plain error affecting substantial rights, Civil Rule 79.04, V.A.M.R., and on that discretionary basis we shall examine the contention presented now for the first time, that we erred in not ruling the case pursuant to "federal substantive law" which plaintiffs at no time urged.

Section 301(a) of the Labor Management Relations Act of 1947, 29 USCA Section 185(a), provides as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." In Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed. 2d 246, the United States Supreme Court,

speaking through Mr. Justice White, stated that this section "has substantive content and that Congress has directed the courts to formulate and apply federal law to suits for violation of collective bargaining contracts." Quoting then from Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 81 S.Ct. 571, 7 L.Ed. 2d 593, the court also said: "'The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiations and administration of collective agreements.'"

Plaintiffs assert that "Under federal law the courts may even interpolate * * * if the federal policy will be served thereby," and although they say "such is not needed here" they clearly imply that their understanding of federal policy is that they should not lose this litigation, and that we should read into the contract such nonexisting provisions as are necessary to carry out that policy. They say we "deviated from federal requirements" when we applied "the same Missouri law that would be applied to all contracts regardless of their nature," and "had the court considered federal law and endeavored to reach a conclusion consonant therewith, the court should have found itself compelled to reach a contrary result." They further argue that the result of plaintiffs losing this litigation "would certainly never promote industrial stability or peace and can only be 'a breeder of discontent and unharmonious relations between employer and employees,'" and the "failure to consider the interests and position of the plaintiffs could never meet or satisfy the federal requirements or standards."

We are not convinced that it is "federal policy" that in a suit of this nature we must interpolate into the contract such non-existing provisions as may be necessary in order to enable plaintiffs to prevail regardless of the merits of their position. We shall, therefore, turn to the question of

whether the result we reached in construing the terms of the contract as written is contrary to "federal substantive law." In their motion for rehearing plaintiffs cite not one federal case construing language of a collective bargaining agreement which was the same or similar to that construed in the principal opinion, and not one federal case is cited in the motion for rehearing which tends to hold that the result we reached in construing the contract as written is incorrect. In the preparation of the principal opinion we ruled the issues by giving the language of the contract its normal meaning in accordance with its accepted usage. In doing so we considered every case cited by plaintiffs, none of which were federal cases. In our research on the issues we studied and considered not only Missouri cases, but the federal cases and cases of other states pertaining to the issues. We found no federal case directly in point, but we cited two, a court of appeals opinion and an opinion of the United States Supreme Court, on related matters. Assuming, therefore, that in this suit we are required to apply federal substantive law, it is our conclusion that we did so insofar as there has been a pronouncement thereof by the federal courts, and that we correctly applied it and the result reached is in accord therewith. There is absolutely nothing in Smith v. Evening Press Association or any other federal case cited by plaintiffs in their motion for rehearing, which directly or inferentially holds that the result we reached is contrary to federal substantive law, and plaintiffs certainly have not demonstrated in their motion for rehearing that on the merits we reached an incorrect result. The motion for rehearing is overruled.

For the reasons set forth in the per curiam in Irwin v. Globe-Democrat Publishing Company, —— S.W. 2d ——, 53 LRRM 2495, there is no federal question which requires or justifies a transfer of this case to the court en banc. No supreme court rule requires, and we find no reason to order, its transfer. The alternative motion to transfer to the court en banc is denied.

APPENDIX D

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER TWO

No. 49,026

HALEY IRWIN, ET AL., *Respondents*

v.

GLOBE-DEMOCRAT PUBLISHING CO., *Appellant*

[On Rehearing, June 4, 1963]

* * * * * * * * * * *

PER CURIAM:—Plaintiffs contend in their motion for rehearing that we did not "take into account section 301(a) of the Labor Management Relations Act of 1947, 29 USCA, Section 185(a) and the decided cases" of the Supreme Court of the United States holding that there should be a uniform body of substantive law conformable to the federal law in the field of labor relations," and that in deciding issues arising out of collective bargaining contracts this court "was sitting as a court of the United States," and consequently it was bound by the Seventh Amendment to the Constitution of the United States.

We have examined plaintiffs' brief filed in this court and we fail to find any reference to the above contentions. Only one federal case was cited in their brief, In re Public Ledger, Inc., 161 F. 2d 762. Plaintiffs placed their complete reliance upon that case and upon cases from this and other states, and upon the report in two arbitration decisions, all of which we expressly considered in the opinion. It has long been the rule that new propositions and complaints not submitted in the original brief, Ford v. Wabash Ry. Co., 318 Mo. 723, 300 S.W. 769, 778, and raised for the first time after the opinion is handed down, Phippin v. Missouri Pacific R. Co., 196 Mo. 321, 93 S.W. 410, 418, or which are clearly afterthoughts, State ex rel. Cole v. Matthews, Mo., 274 S.W 2d 286, 292, will not be

considered on motion for rehearing. We do not propose now to change or relax that rule. However, if in a suit in a state court on a collective bargaining agreement by an employee we are required to apply "federal substantive law," and we did not do so and the result reached is contrary to such law, then plain error would have resulted. In our discretion, we may consider plain error affecting substantial rights, Civil Rule 79.04, V.A.M.R., and on that discretionary basis we shall examine the contention, presented now for the first time, that we erred in not ruling the case pursuant to "federal substantive law" which plaintiffs at no time urged.

Section 301(a) of the Labor Management Relations Act of 1947 29 USCA Section 185(a), provides as follows: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." In Smith v. Evening News Association, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed. 2d 246, * * * the United States Supreme Court, speaking through Mr. Justice White, stated that this section "has substantive content and that Congress has directed the courts to formulate and apply federal law to suits for violation of collective bargaining contracts." Quoting then from Local 174, Teamsters, etc. v. Lucas Flour Co., 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed. 2d 593, * * * the court also said: "'The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'"

Plaintiffs assert that because "federal law" is to be applied to this case the "opinion should be reviewed to

determine if it is harmonious with the body of substantive law in the field of labor relations as promulgated by the federal courts," and that if it is not this court should modify its opinion to so conform. The "body of substantive law" relied upon by respondents in their motion for rehearing, and in the suggestions in support thereof, consists of but one federal case (another federal case is cited in support of a different point), the same one cited in their original brief to this court, In re Public Ledger, Inc., 161 F. 2d 762, and their argument pertaining to the substantive law of that case is precisely the same as that presented in their original brief which we carefully considered and rejected as decisive of the issue on appeal. Upon re-examination we are still of the opinion that In re Public Ledger, Inc., does not require nor justify a ruling different from that reached in the principal opinion.

In the preparation of the principal opinion we ruled the issues by giving the language of the contract its normal meaning in accordance with its accepted usage. In determining this meaning we looked not only to the one federal case and the numerous state cases cited by respondents, but we also looked to and relied on other cases found by us in the course of our research including two cases in the lower federal courts and one opinion of the Supreme Court of the United States. No federal case was then found, none has been found upon re-examination, and respondents certainly have cited no federal case which, in the words of Mr. Justice White, formulates and applies federal law which would require or justify a result different from that we reached in the principal opinion. Assuming, therefore, that in this suit we were required to apply federal substantive law, it is our conclusion that we did so and that we did so correctly. There is absolutely nothing in Smith v. Evening Press Association, or the other federal cases cited by plaintiff in the motion for rehearing, which directly or inferentially holds that the result we reached is contrary to federal substantive law, and

plaintiffs certainly have not demonstrated that on the merits we reached an incorrect result.

We do not agree, assuming we are required to apply federal substantive law, that in doing so this court "was sitting as a court of the United States" any more than it is sitting as a court of a sister state when it applies the law of that state. Therefore, there is no merit to the contention that the Seventh Amendment to the Federal Constitution has any application to this case.

All other matters in the motion for rehearing have been carefully considered and are found to be without merit, and the motion for rehearing is overruled.

Respondents also assert that because of the issues presented for the first time in their motion for rehearing "there is now involved in this cause a federal question," and they are entitled to have this case transferred to the court en banc.

Section 9, Article V, Constitution of Missouri, provides that a cause shall be transferred to the court en banc when (a) the members of a division are equally divided in opinion, (b) when the division shall so order, (c) on the application of the losing party when a member of the division dissents from the opinion therein, (d) when "a federal question is involved," and (e) pursuant to supreme court rule. This court has held that the term "federal question," as used in Section 9 of Article V is to be "interpreted according to the standard" contained in Section 3 of Article V, pertaining to jurisdiction of the supreme court, which refers to "cases involving the construction of the Constitution of the United States or of this state, the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, * * *"; McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 324 Mo. 1005, 25 S.W. 2d 791; Huckleberry v. Missouri Pac. R. Co., Mo. Sup., 26 S.W. 2d 980.

988; Pashea v. Terminal R. Ass'n of St. Louis, 350 Mo. 132, 165 S.W. 2d 691, 696; State ex rel. Perrine v. Keirnan, 361 Mo. 871, 237 S.W. 2d 156. This case, as submitted to this court, did not involve a federal question. New matters not submitted in the original brief but raised for the first time in a motion for rehearing after the opinion is handed down do not present any federal question requiring a transfer to the court en banc. No supreme court rule requires a transfer of this case, and after careful consideration we conclude that no reason exists for this division to order a transfer. The alternative motion to transfer to the court en banc is denied.

* * * * * * * * * *

APPENDIX E

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER ONE

No. 49,603

JOSEPH P. MONTEROSSO, ET AL., *Appellants*

v.

ST. LOUIS GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent

[On Rehearing. June 4, 1963]

PER CURIAM: In their motion for rehearing or to transfer to the court *en banc* appellants contend, for the first time, that a federal question is involved, and that this case should be governed by the federal common law or federal substantive labor law, in the interest of industrial peace. The *per curiam* opinions this day filed in *Ackerman* v. *Globe-Democrat Publishing Co.*, No. 49,308, and *Irwin* v. *Globe-Democrat Publishing Co.*, No. 49,026, dispose of these contentions adversely to appellants.

Appellants further contend that our construction of the word "consolidation" contradicts the clear intention of the parties as expressed in the same clause of the contract. This constitutes mere reargument of one of the issues determined by the opinion, and under Supreme Court Rule 83.16 is to be disregarded.

The motion for rehearing or to transfer is overruled.

APPENDIX F

Survey of Collective Bargaining Agreements Which Provide for Severance Pay in the Event of Loss of Employment Resulting From Merger, Consolidation or Suspension of Publication of Newspapers

1(a). *New York City;* N.Y. Typo. Union No. 6; Newspapers—Times, Herald Tribune, Mirror, News, Journal American, World Telegram & Sun, Post, Long Island Press (Queens, N.Y.); 3,800 printers. The specific contractual provision is as follows:

SUSPENSION OR MERGER PAY

In the event of a merger, consolidation, or permanent suspension of any newspaper covered by this agreement, any employee who at the time of such merger, consolidation or permanent suspension has been a regular situation holder for at least one year or who during his current period of uninterrupted priority has accumulated at least one year of service as a regular situation holder and who by virtue of such merger, consolidation or permanent suspension is deprived of employment, shall receive, in addition to any accumulated vacation credits or any other money due him, the cash equivalent of three weeks' (fifteen shifts') pay at the current rate, provided that any employee who retains his situation because such merger or consolidation resulted in a dove-tailed priority list shall not be entitled to severance pay.

(b). *New York City;* N.Y. Mailers Union No. 6; same newspaper coverage as 1(a); 1,131 mailers. The specific contractual provision is as follows:

Section 21-a. Suspension or Merger Pay. In the event of merger, consolidation, or permanent suspension of any newspaper covered by this agreement any employee who has during his current period of employment in the office

accumulated one (1) year or more of service as regular situation holder and who by virtue of the merger, consolidation, or permanent suspension is deprived of employment shall receive, in addition to any accumulated vacation credits or any other money due him, the cash equivalent of three (3) weeks' (fifteen [15] shifts') pay at the current rate, provided, that any employee who retains his situation because such merger or consolidation resulted in a dovetailed priority list shall not be entitled to severance pay.

2(a). *Chicago;* Chi. Typo. Union No. 16; Newspapers—Tribune, Daily News, American, Sun-Times; 1,185 printers. The specific contractual provision is as follows:

SUSPENSION, MERGER PAY

Section 51. In the event of merger, consolidation or permanent suspension of publication by any newspaper covered by this Agreement, all regular situation holders who thereby are deprived of a regular situation, having one year or more service as such of regular employment, shall receive suspension or merger pay as follows:

Employment of 1 year	1 week
Employment of 2 years	2 weeks
Employment of 3 years	3 weeks
Employment of 4 years	4 weeks

(b). *Chicago;* Chi. Mailers Union No. 2; same newspaper coverage as 2(a); 895 mailers. The specific contractual provision is as follows:

Section 41. In the event any Employer, a party to this contract, suspends publication, or a merger of two or more newspapers covered by this contract occurs, employees of the mailing departments who have had one year or more of service with the Employer and who are laid off as regular employees as a result of such suspension or merger shall receive suspension or merger pay as follows:

Employment of 1 year	1 week
Employment of 2 years	2 weeks
Employment of 3 years	3 weeks
Employment of 4 years	4 weeks

3(a). *Los Angeles;* L.A. Typo. Union No. 174; Newspapers—Times, Herald Examiner; 490 printers. The specific contractual provision is as follows:

SUSPENSION OR MERGER PAY

Section 31. In the event of a merger, consolidation or permanent suspension of any newspaper covered by this agreement, any employee who, at time of such merger, consolidation or permanent suspension has continuously been a situation holder for at least one year and who, by virtue of such merger, consolidation or permanent suspension is deprived of a situation, shall receive, in addition to any accumulated vacation credits or any other money due him the cash equivalent of three (3) weeks (15 shifts) pay at the current rate, provided, that any employee who retains a situation after such merger or consolidation shall not be entitled to severance pay.

(b). *Los Angeles;* L.A. Mailers Union No. 9; same newspaper coverage as 3(a); 297 mailers. The specific contractual provision is as follows:

SUSPENSION OR MERGER PAY

Section 35. In the event of a merger, consolidation, or permanent suspension of any newspaper covered by this agreement, any employee who at the time of such merger, consolidation or permanent suspension has been a regular situation holder for at least one year or who during his current period of uninterrupted priority has accumulated at least one year of service as a regular situation holder and who by virtue of such merger, consolidation or permanent suspension is deprived of employment, shall re-

ceive, in addition to any accumulated vacation credits or any other money due him the cash equivalent of three weeks' (fifteen shifts') pay at the current rate, provided, that any employee who retains his situation because such merger or consolidation resulted in a dovetailed priority list shall not be entitled to severance pay.

4(a). *San Francisco;* San Fran. Typo. Union No. 21; Newspapers—Chronicle, Examiner, News-Call Bulletin; 883 printers. The specific contractual provisions is as follows:

Section 36. Sale, Suspension or Merger. In the event of sale, consolidation, permanent suspension of merger of composing rooms of newspapers operating under this contract, all employees with six months continuous priority who are on the payroll of the Publisher at the time of such event and who are not retained on a situation with the Publisher, or the Publishers's successors or assigns for eight weeks following such sale, suspension, consolidation or merger, shall receive four (4) weeks (20 days) wages at their regular straight time rate of pay.

(b). *San Francisco:* San Fran.-Oakland Mailers Union No. 18; 307 mailers. The specific contractual provision is as follows:

Section 28. In the event of sale, consolidation, permanent suspension or merger of mailing rooms of newspapers operating under this contract, all employees with six (6) months continuous priority who are on the payroll of the Publisher at the time of such event and who are not retained on a situation with the Publisher, or the Publisher's successor or assigns for eight (8) weeks following such sale, suspension, consolidation or merger, shall receive four (4) weeks (20 days) wages at their regular straight time rate of pay.

5. *Cleveland;* Cleve. Typo Union No. 53; Newspapers—Plain Dealer, Press and News; 757 printers. The specific contractual provision is as follows:

CONSOLIDATION OR PERMANENT SUSPENSION

Section 25. In the event of consolidation, merger or permanent suspension of The Cleveland Press and News or The Plain Dealer employes of one year's service or more who, within thirty (30) days, lose their situations because of such consolidation, merger or permanent suspension, shall be given two weeks' pay at regular straight time rate provided herein.

6. *Philadelphia:* Phil. Typo. Union No. 2: Newspapers—Bulletin, Inquirer, News: 463 printers. The specific contractual provision is as follows:

SEVERANCE PAY

Section 10. In the event of consolidation, merger, or permanent suspension of the Philadelphia Inquirer or the Philadelphia Daily News, employes of one year's service or more who within thirty (30) days, lose their situations because of such consolidation, merger or permanent suspension, shall be given two weeks' pay at regular straight time rate provided herein.

7. *Cincinnati:* Cin. Typo. Union No. 3: Newspapers—Enquirer, Post & Times-Star; 500 printers. The specific contractual provision is as follows:

CONSOLIDATION OR PERMANENT SUSPENSION PAY

Section 46

In the event of merger, consolidation or permanent suspension of business by any employer covered by this contract, all situation holders and apprentices with one (1) year or more of service who, within ninety (90) days, lose their employment by virtue of such merger, consolidation or suspension and are not rehired as a situation holder within 22 consecutive calendar days, shall receive cash equivalent to one (1) week's pay for each year of priority and service in the office up to a maximum of 4 weeks' pay.

8. *Kansas City, Mo.*: K.C. Typo. Union No. 80; Newspapers—Times, Star; 355 printers. The specific contractual provision is as follows:

SUSPENSION OR MERGER

Sec. 37. In the event of permanent suspension, merger or consolidation of business on the part of the Company, it is agreed that severance pay to the extent of two full weeks' wages shall be due all composing room employees deprived of regular composing room employment affected by such permanent suspension, merger or consolidation.

9. *Indianapolis*: Ind. Typo. Union No. 1; Newspapers—News, Star, Times; 406 printers. The specific contractual provision is as follows:

Section 48. In the event of merger, consolidation, or permanent suspension of publication by any newspaper covered by this agreement, all regular situation holders who thereby are deprived of a regular situation, having one year or more of service as such, shall receive suspension or merger pay equivalent to one week for each year of such employment up to a maximum of four weeks.

10. *Milwaukee*: Mil. Typo. Union No. 23; Newspapers—Sentinal, Journal; 322 printers. The specific contractual provision is as follows:

MERGER

Section 18. In the event of merger, consolidation or permanent suspension of publication by any newspaper covered by this agreement, all employes affected shall be given two weeks severance pay. Such severance pay shall be at the employe's regular straight time rate of pay.

11. *Wilmington, Del.*: Wilm. Typo. Union No. 123; 207 printers. The specific contractual provision is as follows:

In the event of merger, consolidation, or permanent suspension of any newspaper covered by this agreement any

employe who has during his current period of employment in the office accumulated one year or more of service as regular situation holder and who by virtue of the merger, consolidation or permanent suspension is deprived of employment shall receive, in addition to any accumulated vacation credits or any other money due him, the cash equivalent of two weeks' (ten days) pay at the current rate for his first year of service. For each additional year as a regular situation holder he shall receive the cash equivalent of one week's pay at the current rate, provided that severance pay granted to any one individual shall not exceed ten weeks in the aggregate.

12. *Phoenix, Ariz.;* Phoenix Typo. Union No. 352; Newspapers—Republic, Gazette; 256 printers. The specific contractual provision is as follows:

Section 43. Men who have been employed in the composing room for a period of five (5) years or more shall be entitled to two weeks' (10 working days) severance pay, and men who have been employed from one to and including four (4) years shall receive one week's (5 days) severance pay in the event of future mergers, consolidations or suspensions resulting in loss of employment to the man affected.

13. *Boston;* Bos. Typo. Union No. 13; Newspapers—Record-American, Advertisers, Globe, Herald, Traveler; 1,374 printers. The specific contractual provision is as follows:

SUSPENSION PROVISION

Section 45. In the event of a permanent suspension of publication of any newspaper or the permanent amalgamation of newspapers by a signee of this contract a payment of two weeks' (10 days) wages shall be made to members who lose situations thereby by their latest employer.

14. *Denver:* Den. Typo. Union No. 49; Newspapers—Rocky Mt. News, Post; 370 printers. The specific contractual provision is as follows:

Article X

Consolidation or Suspension Pay

1. In the event of consolidation or permanent suspension, all regular employes with one (1) year or more of priority who by virtue of consolidation or suspension do not receive a regular situation in plants of parties to this agreement within two (2) weeks, for at least three (3) months' duration, shall receive the cash equivalent of two (2) weeks' [ten (10) shifts] pay at the current rate.

15. *Salt Lake City:* Salt Lake City Typo. Union No. 115; Newspapers—Tribune, Desert News Telegram; 152 printers. The specific contractual provision is as follows:

Severance Pay

Sec. 56. In event of consolidation or suspension all employes deprived of employment shall receive two weeks' notice and two weeks' pay at the regular rate of pay.

16. *Seattle:* Seat. Typo. Union No. 574; Newspapers—Post-Intelligencer, Times; 574 printers. The specific contractual provision is as follows:

Sec. 2. In the event of a permanent suspension of publication of either newspaper or the permanent merger of newspapers operating under this contract, all journeymen who have held full-time situations for one year or longer, and who are discharged through this cause and not reemployed as full-time situation holders by the merged papers, shall receive a payment of two weeks' (ten days') wages at their regular straight-time rate of pay.

17. *Chattanooga, Tenn.:* Chat. Typo. Union No. 89; 118 printers. The specific contractual provision is as follows:

Sec. 35. In event of consolidation or suspension, all employes affected shall receive severance pay of not less than two weeks' pay at the regular rate of pay.

18. *Pittsburgh;* Pitt. Typo. Union No. 7; Newspapers—Post-Gaz. & Sun-Tel., Press; 320 printers. The specific contractual provision is as follows:

SEVERANCE PAY IN EVENT OF CONSOLIDATION

Section 65. In the event of consolidation of any composing rooms resulting in a single hook operation all regular employees with one year or more of service who by virtue of the consolidation do not obtain regular situations of at least three months' duration, shall receive the cash equivalent of two weeks' (ten shifts) pay at their current rate.

19. *New Orleans;* N.O. Typo. Union No. 17; Newspapers—Times-Picayune, States & Item; 14 printers [?]. The specific contractual provision is as follows:

Section 15. In event of consolidation or suspension all employes affected shall receive severance pay of not less than two weeks' pay at the regular rate for one year's priority.

20. *Wichita, Kan.;* Wich. Typo. Union No. 148; Newspapers—Eagle, Eagle & Beacon; 97 printers. The specific contractual provision is as follows:

Section 8. In event of consolidation or suspension all employees affected shall receive severance pay of not less than two weeks.

21. *Tampa, Fla.;* Tanipa Typo. Union No. 299; Newspapers—Tribune, Times; 160 printers. The specific contractual provision is as follows:

SEVERANCE PAY

Section 6. In event of consolidation or permanent suspension all employes affected shall receive two weeks severance pay at the regular rate.

22. *Birmingham, Ala.:* Birm. Typo. Union No. 104; Newspapers—Post-Herald, News; 208 printers. The specific contractual provision is as follows:

SEVERANCE PAY

Section 44

All employes who lose their employment by reason of sale, consolidation or merger of party of first part, signatory hereto, shall be paid (3) three weeks' salary.

23. *Syracuse, New York:* Syr. Typo. Union No. 55; Newspapers—Herald-Journal, Herald-American, Post-Standard; 194 printers. The specific contractual provision is as follows:

SEVERANCE PAY

Section 38. In the event of the sale, merger, suspension, transferring of equipment or employees to another plant (building), owned or controlled by parties to this agreement, employees whose employment and weekly earnings are forfeited because of the sale, merger, suspension, transferring of equipment or employees to another plant (building), owned or controlled by parties to this agreement, shall receive severance pay as follows:

Those holding priority continuously from one (1) through four (4) years shall be paid (1) week's pay for each year of service, but not to exceed three (3) weeks pay. Those holding regular situations continuously five (5) years or more shall receive five (5) weeks severance pay.

Regular situation holders who do not lose their situations and are employed as situation holders for five (5) of the six (6) month period immediately following the merger, sale, suspension, transferring of equipment or employees, shall not be entitled to severance pay.

For the purpose of this section "suspension" shall mean the paper involved closes its doors permanently.

24. *Honolulu;* Hono. Typo. Union No. 37; Newspapers—Advertiser, Star Bulletin; 168 printers. The specific contractual provision is as follows:

Section 15. SEVERANCE PAY. When an employee covered by this agreement, after six (6) months (125 straight time shifts) of continuous service in the composing room of the Employer, loses his employment due to permanent suspension, consolidation, or sale of the Employer's business, he shall receive three (3) weeks (15 straight time shifts) cash severance pay at the rate he was receiving at the time of severance.

25. *Columbia, S. C.;* Colum. Typo. Union No. 34; 70 printers. The specific contractual provision is as follows:

Section 12 (a). Should there be suspension of either The State or The Columbia Record during the term of this contract, any employee who loses his or her situation as a result of such suspension shall be entitled to two weeks notice of such layoff or receive two weeks' severance pay.

26. *Des Moines, Iowa;* Des Moines Typo. Union No. 118; Newspapers—Register, Tribune; 186 printers. The specific contractual provision is as follows:

Section 7. a. In the event of the permanent suspension of all of the newspapers published by the Company at Des Moines, Iowa, not caused directly or indirectly by strike, slowdown or similar activities of employees of the Company, all regular situation holders with one (1) year or more of priority shall receive, the cash equivalent of two weeks' (ten shifts') pay at their straight-time rates of pay.

27. *Boise, Idaho;* Boise Typo. Union No. 271; Newspaper—States man; 52 printers. The specific contractual provision is as follows:

SEVERANCE PAY

Section 15. Each employe shall receive two weeks' wages for each year of continuous employment, not to exceed 8 weeks' wages, when his employment is terminated by suspension, merger or installation of new processes which have directly caused the elimination of his job, provided an employe has been employed for at least three years and worked a minimum of 200 shifts each year for the office prior to his termination, excluding time off for illness.

It is agreed that a situation holder who continues as an extra or substitute for the employer after his situation has been eliminated shall not receive severance pay as long as the employe works for the employer either as an extra or situation holder.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 518.

MEYER ACKERMAN et al.,
Petitioners,

vs.

GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

BRIEF

In Opposition to Certiorari.

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Footnote to Page 8, Line 22.

Of the three cases, other than this, whereof opinions are set out in the pending petition (Allen v. Globe-Democrat, p. 24a, Irwin v. Globe-Democrat, p. 40a, Monterosso v. Globe-Democrat, p. 45a) and which are interrelated to this case by petitioners at page 26 of their petition, Allen has become final because no petition for certiorari was filed, and Irwin and Monterosso have been the subject of petitions (Nos. 415 and 414, respectively, October Term, 1963) which were denied by this Court Nov. 12, 1963, after this brief had gone to press.

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MEYER ACKERMAN et al.,
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GLOBE-DEMOCRAT PUBLISHING COMPANY,
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BRIEF

In Opposition to Certiorari.

STATEMENT.

This litigation stems from a collective bargaining agreement and, more particularly, from those provisions in that agreement which set forth the conditions under which the employer was committed to pay severance pay. In short, this case involves the construction of a written agreement.

Throughout, the petitioners here initiated and litigated the issues on the basis of local law (*infra* § IV). On that basis they prevailed at the trial. On that basis, the Missouri Supreme Court reversed the judgment in petitioners' favor (Pet. 19a) and directed the entry of judgment for respondent (Exh. A, p. 3). Thereafter, the petitioners moved for rehearing, or in the alternative, for a hearing

en banc. Then, for the first time, petitioners attempted to inject a federal question, i. e., that the court should have construed the contract not under local Missouri law (as petitioners had previously requested), but under federal substantive law (Exh. C, p. 3, etc.). This attempt was repulsed by the Missouri Supreme Court in an opinion holding that the new issue was raised too late, and pointing out that no difference between applicable Missouri and federal law had been cited or found (Pet. 19a *et seq.*; *v.* also *infra* II, III).

Petitioners took no steps to stay the mandate of the Missouri Supreme Court (Exh. C). Accordingly, the mandate was issued to the Circuit Court which entered judgment in favor of respondent (Exh. B). Petitioners took no measures to stay or suspend the finality of that judgment (Exh. B) and the Missouri courts are now powerless to act in respect of that judgment.

SUMMARY OF ARGUMENT.

I. Petitioners' application for a writ of certiorari presents a moot question. Petitioners failed to stay the mandate of the Missouri Supreme Court and failed to stay or suspend the finality of the judgment entered by the Circuit Court of the City of St. Louis pursuant to said mandate. Under Missouri law, neither Court now has jurisdiction to take any action in respect of said judgment and would be powerless to respond to any order of this Court.

II. Petitioners present no proper grounds for review of the final judgment of the Missouri Supreme Court. The two federal questions set forth in petitioners' brief (Pet. 3) were not duly raised and decided. Question 1, dealing with the inviolability of jury verdicts, is presented by petitioners for the first time in their brief on this application. Question 2, regarding the application of federal substantive law to the enforcement and interpretation of the contract provisions for severance pay, was not ruled upon in the final judgment below.

III. The judgment of the Missouri Court is supported by adequate independent non-federal State grounds: i. e., the alleged federal questions was raised too late, viz., on motion for rehearing.

IV. Petitioners have demanded the application of Missouri contract law throughout this litigation. Hence, they are now estopped from asserting that the Missouri Courts deprived them of a federal right by adjudicating the merits of this contract dispute under principles of Missouri contract law.

ARGUMENT.

I.

Mootness.

This petition is moot; for no order of this court can now give petitioners relief; petitioners have never made any effort to stay the effectiveness of the orders below, and the judgment entered thereon has become final beyond the jurisdictional power of any court to set aside or modify. The chronology of the events after the appeal recorded in the courts' minutes is as follows:

Missouri Supreme Court*	Jan. 29, 1963	Argued and submitted;
" "	April 8, 1963	Reversed; all concur;
" "	June 4, 1963	Respondent's motion to rehear or transfer overruled;
" "	June 20, 1963	Mandate and certified copy of opinion mailed to Clerk of Circuit Court, City of St. Louis.
Missouri Circuit Court*	July 2, 1963	Mandate and opinion of Supreme Court filed; judgment of November 21, 1961, set aside and new judgment entered for defendant

* The Supreme Court minutes are authenticated in Exhibit A, and those of the Circuit Court in Exhibit B, filed herewith with the Clerk.

The action of transmitting the mandate, on the sixteenth day after the filing of the order overruling the motions of respondent, was taken at that time in accordance with Missouri Supreme Court practice; because no further motion (e. g., to stay the mandate) was filed by respondent within the fifteen-day time limit fixed by Missouri Supreme Court Rules (Rule 83.16 and Rule 84.02) for filing post-opinion motions.

There was a twelve-day lapse (June 20-July 2) before the trial court, acting upon the mandate, was to enter the requisite judgment, during which respondent could have

requested the Supreme Court of Missouri to recall the mandate, pending an application for certiorari, but they did not do so.

After the trial court entered the judgment on July 2, under Missouri law the trial court retained for 30 days power to vacate the judgment, to permit the plaintiffs effectively to pursue their application for certiorari; but they did not seek vacation. After that time the trial court lost jurisdiction. Rule 75.01 of the Missouri Supreme Court reads as follows:

> "The trial court retains control over judgments during the 30-day period after entry of judgment, and may vacate, reopen, correct, amend or modify its judgment for good cause within that time . . ."

Thus petitioners had from June 4, 1963, when the Missouri Courts finally decided the case, until August 2, 1963, when the Missouri courts finally lost jurisdiction over the case, to implement their application for certiorari by staying the finality of the judgment. For this period of fifty-eight days petitioners made no effort to do so. Although later efforts would have been ineffective, petitioners have not even yet taken any step in this direction.

There is not the slightest reason to suppose that either Missouri court would, if requested, have refused a stay or vacation or have imposed impossible conditions upon the granting of either. However, ample remedy would have been available to respondent in such an event under 28 U. S. C. 2101 (f) by obtaining a stay in the Supreme Court of the United States. The section provides:

> "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

(Cf. also Supt. Ct. Rules 27.50 and 27.51).

Interest reipublicae ut sit finis litium.

The Supreme Court of Missouri exhausted its jurisdiction when the Circuit Court entered judgment in conformity to the mandate it had received. The Circuit Court's jurisdiction expired thirty days after the entry of the judgment. To whom, then, would this court issue its mandate on final decision? And what action would it require therein? Obviously, this court's mandate could not require the Supreme Court of Missouri to take further action in the case "in accordance with this opinion"; for the case is not, and would not be, before that court. To be effective the mandate would have to be addressed to the Missouri legislature; requiring it to enact laws to revest jurisdiction in the Missouri Supreme Court in such a situation as this.

This case is as moot as that of the condemned criminal, executed during the pendency of the certiorari proceedings because his lawyers failed to obtain a stay.

II.

No Federal Decision.

The Missouri Courts did not decide a federal question. Petitioners *concede* that until their motion to transfer

or rehear they never throughout the litigation invoked a federal right (Pet. 25). We can then confine our search, to learn whether a federal question was presented and decided, to petitioners' motion to transfer or rehear and to the opinion on the motion. The court's opinion on the motion is included in the petition at page 19-a.

Two federal questions are said to be presented (Pet. 3):

> (1) Whether the principle of the inviolability of a jury verdict supported by evidence within reason applies to an action governed by Section 301 (a) of the Labor Management Relations Act, 1947 * * *
>
> (2) Whether * * * federal substantive law governing the enforcement and interpretation of an L. M. R. A., § 301, agreement, correctly formulated and applied, requires the conclusion that severance pay is due.

(a) Question 1.

Reference to the opinion of the Missouri Supreme Court on the motion shows that the Supreme Court touched neither hide nor hair of the asserted Question No. 1. The federal question brought before that court is very completely paraphrased in this opinion (Pet. 20-a, 21-a), and there is not the slightest suggestion of a contention (let alone a ruling) on the question of whether Section 301 (a), L. M. R. A., makes the jury verdict inviolable.

Counsel are just plain mistaken in inferring by the question that the verdict was "supported by evidence within reason". The fact is that evidence on the meaning of the contract words was objected to by petitioners and generally **excluded** by the trial judge. As to the disputed phrase "who lose employment thereby", the court categorically instructed the jury to apply petitioners' interpretation (R. 492).

The Missouri Supreme Court noted (Pet. 8):

> "The [trial] court refused an offer by Globe-Democrat to prove that among the persons engaged in the printing trade and printing business in the St. Louis area the word 'printing' means the mechanical reproducing of type on paper, and the word 'publication' means the making public of printed matters. Plaintiffs introduced no evidence that in the trade 'publication' is understood as the equivalent of 'printing' or that the Globe-Democrat Publishing Company as a corporation had been involved in any merger or consolidation."

It follows that there was no verdict at all on the application of half of the disputed contract clause, and that there was no evidence permitted and hence no meaningful trial by the jury on the application of the other half of the phrase. To speak of inviolability of the jury verdict in such circumstances is to ignore the requirements of Rule 23.1 (d) of this court that the questions presented be "expressed in the terms and circumstances of the case".

Petitioners include in their appendix opinions in other cases, and even an Appendix F, containing a summary of data (by who knows whom?) completely dehors of the record, not subject to cross-examination or rebuttal, the inclusion of which is not justified by any rule of this court, of Missouri evidence, or federal procedure. But neither the petition nor its appendix (nor, so far as we know, the record filed by petitioners*) includes petitioners' motion to transfer or rehear. In order that the court have means to judge further whether Question No. 1 is "expressed in the terms and circumstances of the case", we have filed a certified copy of their motion to transfer

* Respondent was not served with a copy of "The proceedings in the Supreme Court of Missouri" filed as a part of the record by Respondents. This may include briefs as well as minutes.

or rehear with the Clerk of this Court as Exhibit C to this brief. Reference to the motion shows that there were 11 major points and 9 sub-points made. That petitioners were at that time belatedly attempting to create a federal question is apparent from the fact that of the 20 points and sub-points, 12 made direct mention of a federal question or federal labor law as a basis for the asserted point. But **this** federal question was not raised. The only point that mentions a jury verdict is Point XI (Motion, page 11); but it does so as an assertion of a right based on local law. Unlike the points which raised a federal question, as to which federal authorities were cited, this point is supported by one single authority, a decision of the St. Louis Court of Appeals which expresses rules for interpretation of a Missouri contract. Significantly, this point is the only point of the 11 which is not developed and discussed in the petitioners' suggestions. The suggestions (pages 12 through 40) discuss Points I through X. There follows a "Conclusion" (page 39). That the point asserts a right only under Missouri law of interpretation of contracts is immediately evident from reading it, and we have set it out at Appendix A to this brief.

Doubtless the reason Point XI was not argued was because it was in the teeth of petitioners' constant contention throughout the litigation **that it was not for the jury to decide what was meant by the contract words in controversy.**

Petitioners' Trial Brief (Exhibit D), page 7, reads:

> "It is plaintiff's position that it is for the Court to construe said phrase. The law is quite clear that construction of a written contract is within the province of the Court, **and such duty is not to be delegated to the jury**" [And so on].

Evidence on which alone the jury could make a decision as to the parties' meaning by the words was objected to by petitioners (R. 132) and sustained (R. 134).

Petitioners offered (it was refused) a peremptory instruction defining the meaning of "permanent suspension of publication" (R. 485).

Petitioners offered (it was given) a peremptory instruction defining the meaning of "lose employment thereby" (R. 492).

Petitioners' Statement, Brief and Argument (Ex. E), pp. 72, 73, argued:

> "The trial court should have directed a verdict for Respondents on all of these issues as a matter of law on the face of the contract. Even after the trial court permitted extrinsic evidence to be introduced, all of that evidence sustained Respondents' interpretation of the Agreement, and a verdict should then have been directed for Respondent. Under such circumstances, Appellant could not have been injured by a submission of construction of the Agreement to the jury. • • •"

Apparently petitioners just could not, in the light of such a history of a contrary position, bring themselves to argue a point commencing:

> "The Court erroneously invaded the province of the jury and substituted its own findings as to the intended meaning of the phrase 'merger, consolidation or permanent suspension of publication' • • •."

In any case, the point involved Missouri law, **not** Federal law.

Petitioners **here** cite in support of their argument on Question No. 1, eleven opinions of the United States Supreme Court—mostly cases arising under the Federal Employers' Liability Act (Pet. 15, 16, 17). None of these

cases was cited below; none of the arguments was made below.

Thus it appears that while Question No. 2 was belatedly posed, after the opinion on the merits in the Supreme Court of Missouri, Question No. 1 was never raised at all in the state courts. It appears for the first time in the petition for certiorari.

In view of the brass-bound rule of law that this court will not entertain on certiorari what was neither presented nor decided below, it would appear, as to the first question presented, that this case is **not** the "suitable vehicle to decide the question" which petitioners believe it to be (Pet., p. 19).

As far back as 1836, Mr. Justice Story, in Crowell v. Randall, 35 U. S. (10 Pet.) 368, 392, 9 L. Ed. 458, 467, after reviewing all the cases down to that time, thus states the rule:

> "It is not sufficient to show that a [federal] question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case."

(b) Question 2.

Let us turn now to the second question said to be presented (Pet., p. 3). There is no doubt that this point, unlike Question No. 1, was in fact raised by petitioners' motion to transfer or rehear. However, this question was not decided by the Missouri Supreme Court, since the court held that it was raised too late.

Petitioners twice in their petition (Pet. 12, Pet. 25), the latter time in italics, quote the opinion of the Missouri Supreme Court as saying, anent the second question:

> "We will consider the matter . . ."

Bob-tailed and shorn of its context, like this, the quotation makes it look as if the Missouri Supreme Court did

consider and decide the asserted federal question. But when we take the rest of the sentence, and the rest of the paragraph, out of the shadow where petitioners left them, we find that this was not so.

What the court said (after stating the petitioners' point [App. 60-a] and ruling that it was made too late under local procedure, App. 21-a, 22-a) was:

> "We will consider the matter, however, sufficiently to point out the following: Although on original submission respondents cited no federal cases, but only Missouri cases and cases from other states, and on this motion for rehearing have not cited any federal cases construing a provision similar to Article XI, our original research, and our research on this motion for rehearing, was conducted in the case law of both hierarchies, state and federal. We have found no federal cases construing such a provision or a similar provision and we are of the opinion that there are no ruling cases in the federal courts applying any different rule or reaching any different result on comparable facts. Respondents have not shown that our decision is contrary to any federal decisions on this subject. We consider our decision not inconsistent with the existing body of federal law. The parties were accorded a review of the provisions of the contract under applicable law on the merits in accordance with accepted principles of construction and on the basis of what the parties said in their agreement. Neither respondents nor appellants were entitled to prevail on the basis of what they intended to say or might have said, or on the basis of the effect a certain construction may have upon industrial peace, nor on any basis except the merits of their contentions."

Thus it is clear that the Missouri court did not retreat from ruling the case, as it had done originally, on the

Missouri principles of law invoked by plaintiffs throughout the litigation. It "considered the question" only "sufficiently to point out" the lack of federal authority, cited or found, showing "that our decision is contrary to any federal decisions on this subject," and it concludes this phase of the opinion by saying (Pet. 22-a):

> "**Having decided this case on its merits** we do not conceive it to be our function to sustain respondents' position in this case willy-nilly, 'lest it be summarily returned to this court by the Supreme Court of the United States,' as respondents' counsel warn on page 12 of their suggestions."

III.

Adequate State Grounds.

In any application here for review by certiorari, the federal question to be reviewed must have been a decision which controlled the result of the case. If there be in addition an adequate independent non-federal ground for the decision, it would do no good to review, and mayhap reverse, the decision of the federal question, since the judgment, on the other stated grounds must go the same way, regardless of the outcome of the review of the federal question.

The principle is well stated in Black v. Cutter Laboratories, 351 U. S. 297, 298, 76 S. Ct. 824, 827, as follows:

> "This Court, however, reviews judgments not statements in opinions. Herb v. Pitcairn, 324 U. S. 117, 125-126, 65 S. Ct. 459, 462-463, 89 L. Ed. 789; Morrison v. Watson, 154 U. S. 111, 115, 14 S. Ct. 995, 997, 38 L. Ed. 927. See also Williams v. Norris, 12 Wheat. 117, 118, 120, 6 L. Ed. 571. At times the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are

made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds. Herb v. Pitcairn, supra; Williams v. Kaiser, 323 U. S. 471, 477, 65 S. Ct. 363, 366, 89 L. Ed. 398."

The principle is applicable whether the independent non-federal ground be substantive or procedural.

In Fay v. Noia, 372 U. S. 391, 83 S. Ct. 822, 9 L. ed. 2d 837, 863 (1963), this court held:

"It is a familiar principle that this court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the co-presence of federal grounds (citing authorities). Section 25 of the Judiciary Act of 1789, c. 20, 1 Stat. 86-87, denied this Court power to base the reversal of a state court decision on any error other 'than such as * * * immediately respects * * * questions of validity or construction of the said (Federal) Constitution, treaties, statutes, commissions, or authorities in dispute.' * * * Murdock [v. Memphis] was a case involving state substantive grounds, but the principle is also applicable in cases involving procedural grounds."

It was expressly held applicable in Radio Station WOW v. Johnson, 326 U. S. 120, 128, 129, 65 S. Ct. 1475, 1480, to independent non-federal procedural grounds, as follows:

"Here the Nebraska Supreme Court held that the federal question had dropped out as a matter of pleading and also denied its merits.

"This brings the situation clearly within the settled rule whereby this Court will not review a state court

decision resting on an adequate and independent non-federal ground even though the state court may have also summoned to its support an erroneous view of federal law (quoting authority)."

Reference to the Missouri Supreme Court's opinion on the motion to transfer or rehear shows that it expressly decided that the alleged federal question was raised too late.

The court's statement was categorical (Pet. 20-a):

> **"The attempt to inject a federal question for the first time in the motion for rehearing came too late to secure a transfer to the court en banc, under our practice and procedure."**

Petitioners attempt in a footnote (Pet. p. 17) to avoid the overwhelming effect of this statement by distinguishing between the quality of federal questions necessary for transfer to banc and for certiorari.

But this is totally irrelevant, for, contrary to petitioners' footnote, **there were not two motions, nor were there two federal questions**—one raised to support transfer and another raised to support rehearing.

There was but one federal question raised (notwithstanding the presentation of two here), and in all aspects it was raised at the same time, i. e., **too late**, in the same paper. The points made in support of the petitioners' motion were stated but once, in support of either relief asked. The motion read (Ex. C, p. 1):

> "Come now Meyer Ackerman et al., Respondents herein, and respectfully move this court * * * to grant Respondents a rehearing of this cause, or, in the alternative, to transfer this cause to the court en banc, and as grounds for this motion Respondents state that (1) there is a Federal question involved; * * *"

Note that petitioners there spoke of "**this** motion" and of "**a** Federal question." Their treatment of this application, as a single motion on a single Federal ground (plus other state grounds), is iterated in their conclusion (Ex. C, p. 39) which says:

> "In support of **such request** [for either relief] Respondents submit that, as pointed out hereinabove, (1) there is **a federal question** involved; * * *"

There is no distinction made in the opinion (nor have petitioners pointed out any in Missouri law, nor have we found any) as to the **TIME** at which a federal question may be raised for a motion to transfer, on the one hand, and for a motion for rehearing, on the other. If it is too late for one, it is necessarily too late for the other.

It is true that in the opinion the court discussed the alternative relief asked separately; but it showed no disposition whatever to forgive the lateness of the assertion for the purposes of a rehearing. Notice the phrase "As indicated" in the passage we next quote from the opinion. This passage followed the categorical denial of transfer quoted above and the statement of petitioners' federal claim, and immediately precedes and illuminates the wounded sentence by which petitioners claim to have overcome their failure to invoke a federal right. The passage is (Pet. 21-a):

> "The suggestion that federal labor policy and federal substantive law governs the construction of this agreement is a new theory, introduced into this litigation for the first time on the motion for rehearing. As indicated, the case was not submitted on any such theory, either in the trial court or in this court. No reference was made in respondents' brief on appeal to federal law, in urging us to adopt their interpretation of Article XI. Both sides treated all questions for decision as questions arising under local law and

determinable by local law. New propositions and complaints, not made in the original briefs, Ford v. Wabash Ry. Co., 318 Mo. 723, 300 S. W. 769, 778, and raised for the first time after the opinion is handed down by the Supreme Court, Phippin v. Missouri Pac. R. Co., 196 Mo. 321, 93 S. W. 410, 418, or which are clearly afterthoughts, State ex rel. Cole v. Matthews, en banc, Mo. Sup., 274 S. W. 2d 286, 292, ordinarily will not be considered on motion for rehearing. We will consider the matter, however, sufficiently to point out the following: . . ."

Thus it is evident that the court held that the only federal question presented was raised too late; and there is no doubt that adequate, independent non-federal grounds for the decision on petitioners' motion were given in the opinion denying the same, and hence no jurisdiction lies in this court to review it.

IV.

Estoppel.

Petitioners are estopped from asserting here that the court below erred in not formulating and applying federal substantive law to the resolution of the issues, because throughout the litigation they asserted their rights under the Missouri substantive law of contracts.

Petitioners admit (Pet. 25):

> "It is true, however, that not until the motion for rehearing or to transfer the case to the court below *en banc* was there a specific advertence to Section 301 (a) of the Labor Management Relations Act, 1947, and the effect exerted by that section in creating federal law controlling the interpretation and enforcement of the agreement."

This is a case not of the mere late assertion of a federal right correlative to or confirmatory of a state right (as of a belated assertion of federal due process, where the litigant had relied earlier upon state due process).

On the contrary, this is a case of the late assertion of a federal right antithetical to, and destructive of, the state law which the litigant has previously relied upon.

Petitioners have contended throughout the litigation that their rights must be decided under principles of local substantive law. The local courts have done so. Now petitioners assert that in doing precisely what they requested, the court has violated federal law.

This is more than the assertion of a federal question too late; it is the assertion of contrary positions in the same case.

While we think the estoppel necessarily follows from the foregoing admission and the nature of petitioners' *volte-face*, it may be helpful to show, beyond the admission that federal law was **not** asserted, the fact that local law **was** asserted as the basis for petitioners' right of recovery.

Petitioners were the plaintiffs below. It was up to them to assert some right, which entailed asserting that the right arose under some law. They sued in the Missouri courts. They invoked no law of any other jurisdiction or authority (R. 1-19), and, under the Missouri procedure, they are therefore presumed to rely upon Missouri substantive law alone. Section 490.110, Mo. R. S. 1959; Robinson v. Gaines, 331 S. W. 2d 653, 655.

No hint or suggestion of reliance on federal law appears in the instructions offered by petitioners for the presentation of their case to the jury (R. 485, 490, et seq.).

Petitioners knock down a straw man (Pet. 14), by denouncing, as "sheerest cavil", an anticipated question

whether the industry in which petitioners were employed affected commerce. Nobody poses such a question. The anticipatory denunciation does not defer us, however, from pointing out that a finding somewhere along the line must be made that petitioners were employed in an industry affecting commerce in order for rights to arise under Section 301 (a), L. M. R. A. Petitioners recognize this as expressly inherent in the very wording of the statute, because the initial predicate for the questions they present here is (Pet. 2):

> "A collective bargaining agreement in an industry affecting interstate commerce . . ."

Yet the entire trial record is devoid of any such allegation or submission. It was the plaintiffs who chose the field of battle. They could have chosen the field of the federal law, in which case they would have invoked Section 301 (a), L. M. R. A., and alleged and proved or secured a stipulation that the employment was in an industry affecting commerce. They did not. They chose as the field of battle the Missouri substantive law, and they will not now be heard to say that the Missouri courts should be reversed for refereeing the battle on that field instead of on the one petitioners passed by.

Even more explicit proof is available that it was the petitioners themselves who made the "error" which they now seek to hang upon the Missouri courts as a basis for jurisdiction here.

We have filed with the Clerk of this Court as Exhibit D to this brief an authenticated copy of the Trial Brief containing petitioners' basic arguments in the trial court, and as Exhibit E hereto a certified copy of their brief in the Supreme Court of Missouri.

The Trial Brief contains thirteen citations to and quotations of judicial opinions.

Not only is there no reference to the federal statute,—not only is there not a single federal opinion included,—but ALL THIRTEEN CITATIONS ARE TO DECISIONS OF THE COURTS OF MISSOURI.

We quote from the Trial Brief as follows:

Page 4. "Missouri law is well established to the effect that . . ." (Citing two Missouri cases and a Missouri statute).

Page 5. "Moreover, the St. Louis Court of Appeals has so ruled in the case of . . ." (citing Missouri opinion).

Page 6. "It is, therefore, clear that under the contract provisions and the law of this state that . . ."

Page 7. "Citing a multitude of cases, including Missouri cases, as being in accord, the annotation in 65 A. L. R. 648, 650-651, gives . . ."

Page 7. "The Missouri courts have consistently upheld the rule that . . ."

Page 8. "Earlier, the St. Louis Court of Appeals had said much the same in . . ."

Page 11. "To repeat what was said by the St. Louis Court of Appeals in . . ."

These quotations make understandable the eight separate record references to Missouri-declared law by the court or by petitioners' counsel in the course of the trial (R. pp. 103, 151, 152, 269, 271, 274, 402 and 458).

Exhibit E, Respondents' Statement, Brief and Argument, similarly presented the cause on appeal as one to be decided under principles of local substantive law.

Throughout this document there is no reference to any federal right. In their Points and Authorities (pp. 25-30), petitioners make 35 references to court opinions and two to statutes. Of the 35 citations to court opinions, 5

are to a decision of each of the States of Minnesota, Montana, North Carolina and Nebraska, and to one of the United States Supreme Court, and two are to the same New Jersey case (The one U. S. case antedated the adoption of Section 301 (a), L. M. R. A. in 1947). The remainder of 28 citations are to Missouri decisions, and the two statutes referred to are Missouri's.

That the Missouri Supreme Court understood their brief to involve Missouri law (as indeed how else can it be understood?) is evident from the shocked statement in the court's opinion on the motion to rehear, etc.:

> "Both sides treated all questions for decision as questions arising under local law and determinable by local law" (Pet. 21-a).

Thus, the petitioners invited the Missouri Supreme Court, as they had invited the Missouri trial court, to determine their rights under principles of Missouri contract law. They will not now be heard to assert that the Missouri courts should be reversed for having done so.

> "An appellant or plaintiff in error is estopped, or will not be permitted, to take advantage of errors for the commission of which he was responsible, or which he himself committed, caused, brought about, provoked, participated in, created, or helped to create, or contributed to, or which he has invited or induced the trial court to commit, as where the ruling, or error, was made at his request or suggestion, or on his urging, or where he procured the making of the ruling or the taking of the action." 5 C. J. S., App. and Error, § 1501.
>
> "The rule is well settled that a party cannot successfully complain of error for which he is himself responsible or of rulings which he has invited the trial court to make." 3 Am. Jur., App. and Error, § 876.

In Virginian Ry. Co. v. Mullens, 271 U. S. 220, 227, 228, 46 S. Ct. 526, 529, this court held:

> "The plaintiff also seeks to support the judgment on the theory that * * * But he is not in a position to urge this contention here. The case stated in the complaint was distinctly in tort. There was no question of a contract obligation, nor any reference to either of the two deeds. And when the court came to charge the jury the plaintiff tendered and the court included in its charge various instructions wherein the case was treated, in keeping with the complaint, as one to recover damages for an alleged tortious creation and continuance of a nuisance. After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below."

CONCLUSION.

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Point XI in Respondents' Motion for Rehearing or, in the Alternative, for Transfer to the Court en Banc and Suggestions in Support Thereof.

"The Court erroneously invaded the province of the jury and substituted its own findings as to the intended meaning of the phrase 'merger, consolidation or permanent suspension of publication' when the Court's opinion makes it plain that different conclusions might reasonably be drawn from this language. When the Court in construing the agreement said (Op. p. 12) that it looked 'at the relationship of the parties, the subject matter of the contract as a whole, the surrounding facts and circumstances to the extent that they are shown and bear upon the matter, and any practical construction the parties themselves may have placed upon the agreement by their acts and conduct,' it conceded, in effect, that the severance pay provision was ambiguous and that different conclusions might reasonably be drawn therefrom, otherwise resort to these criteria would be unnecessary. If the severance pay provision was ambiguous and different conclusions might reasonably be drawn therefrom, then the determination of the issue was for the jury and not for the trial court or this Court.

"National Corporation v. Allan, 280 S. W. 2d 428, 432."

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IN THE

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v.

GLOBE-DEMOCRAT PUBLISHING COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

On November 12, 1963, Mr. Justice Douglas dissenting, this Court denied certiorari in No. 414, *Monterosso* v. *St. Louis Globe-Democrat Publishing Co.*, and in No. 415, *Irwin* v. *Globe-Democrat Publishing Co.* The instant case, *Monterosso*, and *Irwin* arose out of the same factual situation. But there are circumstances differentiating the legal posture of the three cases of sufficient stature that, while *Monterosso* and *Irwin* may

be deemed to lack certiorari caliber, the instant case merits this Court's consideration. Thus:

1. *Monterosso* was tried to the court without a jury. Necessarily absent from it therefore is the question of the role of a jury verdict in the enforcement of an LMRA § 301 agreement.

2. *Irwin* was tried to a jury and in that respect is identical with the instant case. But the contract claim in *Irwin* was grounded on that part of the severance pay clause which provided for dismissal pay in the event an employee was "laid off to reduce the force," and not, as here, on that part of the clause which provided for dismissal pay in the event of lost employment resulting from "merger, consolidation or permanent suspension of publication. . . ." In view of the explicit differentiation in the clause between layoff "to reduce the force" and lost employment caused by "merger, consolidation or permanent suspension of publication," there was no room for a jury verdict based on reduction in force in a situation where the combination of composing rooms necessarily brought the event within the rubric of merger, consolidation, or permanent suspension.

3. This case presents therefore the ideal union of a cause tried to a jury based on a contract claim in which the jury function has fair scope for operation. Furthermore, in neither *Monterosso* or *Irwin* had it been shown, as it has been here, that the particular provision at issue in this case has widespread incidence throughout the United States, so that its adjudication is not parochial, and surely not so in the light of the intrinsic legal significance of the principles it implicates apart from its incidence.

Other objections to certiorari have, we believe, been sufficiently anticipated, except for the claim that the unstayed mandate, now said to be beyond recall, moots the question (Opp. pp. 4-6). As to this, it suffices to say that the "issuance of the lower court's mandate . . . does not destroy the power of the Supreme Court to review the lower court's judgment."[1]

Respectfully submitted,

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[1] Stern and Gressman, Supreme Court Practice, 416 (3d ed. 1962), and cases cited.